TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 60

THE LIBERTY WAREHOUSE COMPANY AND C. M. JONES, TRADING, ETC., PLAINTIFFS IN ERROR,

vs.

B. S. GRANNIS, AS COMMONWEALTH ATTORNEY FOR THE 19TH JUDICIAL DISTRICT OF KENTUCKY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

FILED APRIL 16, 1926

(31,034)

(31,024)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 354

THE LIBERTY WAREHOUSE COMPANY AND C. M. JONES, TRADING, ETC., PLAINTIFFS IN ERROR,

vs.

B. S. GRANNIS, AS COMMONWEALTH ATTORNEY FOR THE 19TH JUDICIAL DISTRICT OF KENTUCKY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 25, 1925

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

326

THE LIBERTY WAREHOUSE COMPANY, a Corporation, and C. M. Jones, Trading and Doing a Tobacco Business, Individually, Plaintiffs,

vs.

B. S. GRANNIS, Commonwealth's Attorney for the 19th Judicial District of Kentucky

PETITION—Filed December 11, 1924

Plaintiffs, Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a looseleaf tobacco business individually, state that the Liberty Warehouse Company is a corporation created, organized and existing under the laws of the State of Kentucky, and as such, authorized to contract and be contracted with, to sue and be sued, and to conduct business under its corporate name aforesaid, and that the plaintiff, C. M. Jones, is also trading and doing a loose-[fol. 2] leaf tobacco business individually.

Said plaintiffs further state that the corporate plaintiff is a resident of the State of Kentucky, having its principal place of business in Maysville, Kentucky, in said state, but that the plaintiff, C. M. Jones, is a citizen and resident of the State of North Carolina.

Said plaintiffs state that each of them is now and has for several years last passed been engaged in the business of operating and conducting a looseleaf tobacco warehouse and a looseleaf tobacco business in the City of Maysville, Kentucky, and that the individual plaintiff, C. M. Jones, has also been engaged in said business as a trader and dealer; and that in the conduct of said business dealings by the plaintiffs, tobacco is sold at public auction on the floors of said Liberty Warehouse Company. Plaintiffs state that the larger part of said tobacco so sold is grown in Kentucky, and that a part of same is shipped into Kentucky from the adjoining states and other states, and to such extent these plaintiffs are engaged in interstate commerce.

Said plaintiffs state that the corporate plaintiff is capitalized at $20,000.00, and has a large investment in the warehouse operated by it, and that said corporate plaintiff employs a large number of men each year in the conduct of its business. Said plaintiffs state that a large part of the value of their business consists of a list of satisfied customers and patrons, and that the business conducted by each of them has a good will value in their customers and patrons, and patrons have been selling tobacco with them respectively for a

[fol. 3] number of years; and that the disclosure of the names of their customers and patrons who produce and own tobacco and sell same at said warehouse, and the disclosure of the postoffice addresses of such customers and patrons would cause to them and each of them a serious loss, in that, their said customers and patrons do not desire to disclose to the public generally, or to competitors in business the amount of tobacco marketed by them respectively, or the prices received by them respectively for the crops so grown and sold, or the names of the owners of the tobacco.

Said plaintiffs state that the General Assembly of Kentucky, at its session held in 1924, passed an Act entitled: "An Act regulating the sales of leaf tobacco at public auction in this Commonwealth," which is chapter 10 of the Acts of 1924 as found on pages 14, 15 and 16 of the Acts of Kentucky for that year; that said law was approved by the Governor of the Commonwealth of Kentucky and became a law in Kentucky on February 27, 1924.

Said plaintiffs state that for the reasons hereinafter set out, their rights are materially and seriously affected by said Act of the General Assembly of Kentucky; that an actual controversy exists with respect thereto, in that, they and each of them have been threatened with serious civil and criminal punishments and penalties for the violation of said Act, and which are about to be enforced thereunder, by reason whereof, and for other manifest reasons, it is impossible for them to continue business or to operate their business without serious financial loss, amounting to confiscation of their rights, business and property, unless a declaration of their rights [fol. 4] and duties under said Act of the General Assembly of 1924 is made by this court.

Said plaintiffs now make this application to this court, both in accordance with the Act of Congress known as the Conformity Statute, and in accordance with the provisions of Chapter 83 of the Acts of 1922 of the General Assembly of Kentucky, known as the Declaratory Judgment Law, for the purpose of securing a declaration of their rights and duties under such Acts of 1924, and for the purpose of having this court determine whether in the conduct of their business, it will be necessary for them to comply with the provisions of said Act of 1923, or whether Chapter 10 of the Act of 1924 is invalid in whole or in part, and if so, in what part.

Said plaintiffs state that in the operation of their business, it has been their custom for a number of years to open the warehouse of the corporate plaintiff on or about the first day of December of each year; and that they have now opened their warehouse for the purpose of selling leaf tobacco at public auction; that in the conduct of their said business and in conducting sales of leaf tobacco at public auction, it is necessary for them to know whether said Act of 1924 is valid or invalid, and whether these plaintiffs are liable for the crimes therein denounced, and subject to the punishments and penalties prescribed in said Act of 1924, and whether under said Act crimes can be innocently committed by them and the penalties therein prescribed imposed upon them, even though diligent efforts are made on their part to comply with the said law.

Said plaintiffs state that the General Assembly of Kentucky in [fol. 5] 1922 passed what is known as the Bingham Co-operative Marketing Act; that in accordance with the provisions of said Act, there was organized by various growers of tobacco in Kentucky and Tennessee and the state adjoining Kentucky a corporation known as the Burley Tobacco Growers Co-operative Marketing Association; that a large number of citizens of Kentucky engaged in growing tobacco became members of said association and executed contracts prepared by said association.

Said plaintiffs state that they do not know the exact percentage of the growers of tobacco in Kentucky who signed said agreement, nor do they know the exact percentage of growers of tobacco in Kentucky who signed said agreement, nor do they know the exact percentage of growers of tobacco in Kentucky who did not sign the same.

Said plaintiffs state that the agreements entered into between said tobacco growers and said association are all alike, and said agreements are in words and figures as follows, to wit:

(Printed form to be inserted.)

[fol. 6] Said plaintiffs state that in the Bingham Co-operative Marketing Act, it was provided in Section 26 that it should be a misdemeanor knowingly to induce or attempt to induce any member or stockholder of said association to commit a breach of his contract; and that it is provided in Section 27 of said Act, that any person firm or corporation, who solicited, persuaded or permitted any member of said association to sell or offer for sale his tobacco, with the knowledge or notice on the part of such person that such tobacco grower was a member of said association, should be liable in a civil suit to a penalty of $500.00 for each offense; and that in addition to said penalty, all costs and attorneys' fees incurred in any litigation should be imposed, in the event any penalty should be recovered.

Said plaintiffs state that they are advised, believe and charge that the Burley Tobacco Cooperative Marketing Association caused to be prepared and to be introduced into the General Assembly of Kentucky what is now known as Chapter 10 of the Act of 1924; that said association was largely instrumental in securing the passage of said Act. Plaintiffs state that said Act of 1924 was intended for the sole use of the Burley Tobacco Co-operative Marketing Association, and was passed for the sole purpose of enabling said Burley Tobacco Co-operative Marketing Association to control more effectually its members, and to secure a performance on the part of its members of contracts made with them.

Said plaintiffs alleged that said Act of 1924 is invalid, because it was passed in violation of the Bill of Rights and the Constitution of the Commonwealth of Kentucky. Said plaintiffs state that under the Bill of Rights, they have a right of seeking and pursuing their safety and happiness and acquiring and protecting their property; that it is further provided in the Constitution that absolute and [fol. 7] arbitrary power over the lives, liberty and property of free-

men exists no where in this republic, not even in the largest majority, and that private property cannot be taken and applied to public use without just compensation being previously made.

Said plaintiffs state that said Act of 1924 is invalid, and in violation of said Bill of Rights, and Sections 2 and 13 of the Constitution; that said Act is invalid because it violates Section 59, Subsection 4, and Section 59, Subsection 29 of the Constitution of Kentucky.

Plaintiffs state that said Act was passed by the General Assembly of Kentucky contrary to the sections of the Constitution of Kentucky herein alleged.

Plaintiffs state that said Act of 1924 is a special or local Act, passed for the sole benefit of said marketing association; that it involves an invasion of the rights of property of these plaintiffs, and was intended to be and is a practical inhibition of the business of selling leaf tobacco at public auction in Kentucky so long as said marketing association continues to operate under the Bingham Marketing Act.

Said plaintiffs state that said law is a special, local and private law; that it was intended to hamper the business conducted by these plaintiffs to such an extent as to destroy said business; and that their business will be destroyed by the enforcement of the provision of said Act of 1924, and the imposition of the punishments and penalties prescribed therein.

Said plaintiffs state that by reason of the provisions of the Act of 1924, said marketing association, through the Commonwealth of [fol. 8] Kentucky, has been given a remedy in the enforcement of its contracts, the enforcement of which means a destruction of the business of these plaintiffs; and that said Act of 1924 was passed for said purpose.

Said plaintiffs state that the interests of the public generally as distinguished from the interests of said marketing association do not require any such interference with them in the conduct of their business in the buying and selling of property and in making contracts with reference thereto.

Said plaintiffs state that the Legislature of Kentucky, under the guise of protecting the interests of the public, have arbitrarily attempted to interfere with private business and to impose unusual and unnecessary restrictions upon the business conducted by these plaintiffs; and that the provisions of the Act of 1924 are arbitrary and oppressive.

Said plaintiffs state that the attempt made by the General Assembly of the Commonwealth of Kentucky to classify the business of conducting a warehouse for the sale of leaf tobacco at public auction is class legislation, and was passed contrary to the Constitution of Kentucky, and that such classification is not a reasonable and natural classification.

Said plaintiffs state that under the contracts made by said marketing association with the growers of tobacco, it does not own the tobacco grown by its members and has no lien on such tobacco, though it is given the right under the Bingham Co-operative Market-

ing Act to enforce specific performance of contracts made and to enjoin their breach.

Plaintiffs state that tobacco is one of many farm products grown by farmers in this state; and that the attempt to put tobacco in a [fol. 9] classification by itself and to place certain restrictions upon the handling of tobacco which are not placed upon other farm products, is unreasonable and unnatural.

Said plaintiffs state that said Act of 1924 imposes upon these plaintiffs special burdens which are not imposed upon other- conducting a like business in the sale of other farm products.

Said plaintiffs state that said Act of 1924 is invalid because it violates the provisions of the Fourteenth Amendment to the Constitution of the United States, in that, same deprives these plaintiffs of the equal protection of the laws and deprives them of their property without due process of law, and is in violation of the Interstate Commerce section in the Constitution of the United States and the Sherman Anti-Trust Act, and that by reason of said Act, the State of Kentucky has denied to these plaintiffs within its jurisdiction an equal protection of the laws, and has attempted to abridge their privileges and immunities as citizens of the United States, and has deprived these plaintiffs of their property without due process of law.

Said plaintiffs state that they have the right to be governed by general rules, and that the General Assembly of Kentucky, in the passage of said special statute and in singling out their cases to be regulated by adifferent law from that which is applied to all similar cases, has acted in an arbitrary and oppressive manner and contrary to the provisions of the Constitution and Statutes of the United States aforesaid.

Said plaintiffs state that said Act of 1924 is an unreasonable restriction upon their right to contract; that it is an unreasonable restriction upon their right to acquire and dispose of property; that [fol. 10] it is an unreasonable restriction to prohibit them from conducting a business which is not detrimental to the public, and which is in no way connected with the police regulations of the government, for the purpose of aiding one corporation in the conduct of its business, or one class of people interested in the conduct of a business by one corporation.

Plaintiffs state that the attempt on the part of the General Assembly of Kentucky to prohibit these plaintiffs from conducting a business is a taking of their property without due process of law; that the requirement that the names of all their customers and patrons shall be disclosed is a taking of their property without due process of law and an arbitrary and oppressive restriction upon their right to do business.

Said plaintiffs further state that said Act of 1924 denies to them the equal protection of the law, in that, the conducting of their business is made a crime, and they are subjected to severe penalties, even though diligent efforts are made to comply with the law.

Said plaintiffs state that the Act of 1924 was intended to deprive these plaintiffs, and others similarly situated, of their property, and was intended to deprive these plaintiffs of personal and civil rights

enjoyed by others; that said Act of 1924 was intended as an impediment to the pursuit of their business; and that by said Act, greater burdens have been laid upon them and each of them than are laid upon others in handling and selling other farm products, and that a different and higher punishment has been imposed upon them or attempted to be imposed upon them, than has been imposed upon others for any similar offense.

[fol. 11] Said plaintiffs state that by the Act of 1924, a discrimination has been made against them by the General Assembly of Kentucky, which is hostile, unusual and unknown in our government.

Said plaintiffs state further that the equal protection of the laws demanded by the Fourteenth Amendment to the Constitution of the United States, has been denied to them by the arbitrary selection and attempted classification of the business conducted by these plaintiffs, and that these plaintiffs have been denied equality in the conduct of their business and in the enjoyment of their rights.

Said plaintiffs state that the defendant, B. S. Grannis, is Commonwealth Attorney for the Nineteenth Judicial District of Kentucky, and he is made a party defendant herein as the representative of the Commonwealth who is charged with the duty of the enforcement of said Act of 1924, and who, as Commonwealth Attorney, prepared the indictments referred to herein. A copy of the petition, in accordance with the law, will be served upon the Attorney General of the State of Kentucky, who has the right to be heard in his own name, or through the Commonwealth's Attorney for the Nineteenth Judicial District. The Commonwealth alone is charged with the duty of enforcing said Act of 1924, and, as these plaintiffs are advised, no other person is a necessary party to this suit.

Wherefore, plaintiffs pray this court by its judgment to declare what their rights and duties under said Act of 1924 are, and that a judgment be rendered declaring said Act of 1924 invalid, and for all proper relief.

Allan D. Cole, J. M. Collins.

Sworn to by C. M. Jones. Jurat omitted in printing.

[fol. 12] IN UNITED STATES DISTRICT COURT

SUMMONS AND SHERIFF'S RETURN—Filed Dec. 23, 1924

The President of the United States of America to B. S. Grannis, Commonwealth's Attorney 19th Judicial District of Kentucky, Greeting:

You are hereby commanded to appear before our District Court of the United States of America for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Lexington, to an-

swer a Bill in Equity exhibited against you in our said court by Liberty Warehouse Co. et al. which you shall in no wise omit, under the penalty of the law.

Witness the Honorable A. M. J. Cochran, Judge of the District Court of the United States of America, and the seal of our said District Court hereto affixed, at the Clerk's Office of said Court, at Lexington, this 11 day of December, 1924, and in the 149 year of our Independece.

J. W. Menzies, Clerk, by Spencer L. Finnell, Deputy. (Seal.)

[fol. 13] NOTE.—Answer or other defense is required to be filed in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Subpœna in Chancery returned and filed December 23, 1924, endorsed: Received this Subpœna at Covington, Kentucky, on December 12, 1924, and executed same at Flemingsburg, Kentucky, on December 19, 1924, by delivering a true copy to the within named B. S. Grannis, Commonwealth Attorney, 19th Judicial District of Kentucky. Roy B. Williams, U. S. Marshal, by Rodman Russell, D. M.

IN UNITED STATES DISTRICT COURT

ORDER TO FILE AMENDED PETITION—Filed Dec. 23, 1924

This day came the plaintiff and offered for filing its amended petition herein, and the court being advised, it is ordered that said amended petition be and the same is now filed and noted of record.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

AMENDED PETITION—Filed Dec. 23, 1924

Now comes the plaintiffs and amend their petition herein and for amendment file herewith copy of the contract of the Burley Tobacco Growers Co-operative Association referred to in the original petition filed herein, and marked Exhibit "A" and being in words and figures as follows, to wit:

Wherefore, etc.

Allan D. Cole, J. M. Collins, Attorneys for Plaintiffs.

[fol. 14] EXHIBIT "A" TO PETITION

Burley Tobacco Growers' Co-Operative Association Agreement

We Organize a Nonprofit Co-operative Association to Sell Our Tobacco Intelligently

The undersigned propose to organize a nonprofit association, without capital stock, for the purpose of promoting, fostering and encouraging the business of marketing tobacco co-operatively; for reducing speculation; for stabilizing the local tobacco markets; for co-operatively and collectively handling the problems of tobacco growers; and for other pertinent purposes.

We Agree with Each Other—No Outsiders in this Contract

We, the undersigned, in consideration of the premises and of our mutual undertakings and of the agreement of each and every party hereto, do hereby agree as follows, each for himself and collectively for the express benefit of and as the association to be organized:

We Agree to be Members

1. We will become members of the Burley Tobacco Growers' Co-operative Association, a nonprofit association, without capital stock, to be organized under the laws of the State of North Carolina. We agree individually and collectively that the directors of the Association to be organized may reincorporate the Association under the laws of the State of Kentucky when suitable legislation is enacted in this State.

Only Growers or Landlords Who Have Tobacco to Sell Can Be Members

2. The Association may include in its membership any tobacco grower, including the landlord or tenant or lessor or lessee of land on which tobacco is grown, provided the landlord or lessor receives all or part of the rental in tobocco.

Will Have 25 Directors—The Office Will Be at Raleigh, N. C., or Lexington, Ky.

3. The affairs of the Association shall be controlled by a board of twenty-five directors; and the legal office of the Association shall be at Lexington, Ky., or at Raleigh, N. C.; and the chief operating office shall be at Lexington, Ky.

Twenty-two Directors Are Tobacco Growers—There Will Be Twenty-two Districts

4. (a) The members shall elect twenty-two directors from among members actually residing and growing tobacco in districts to be

fixed equitably by the Organization Committee on the basis of the tobacco produced by the members actually signed up prior to incorporation.

Each district shall include approximately the same estimated production as any other district; but counties within each district shall be kept intact.

The twenty-two directors, by a two-thirds vote, shall choose three directors at large, one from each of the States of Kentucky, Indiana and Ohio, to represent the interests of the public on the general board. These directors need not be growers of tobacco and may take part in all the discussions in the directors' meetings. Any of these directors who are actual growers of tobacco and, if they are growers, are also members of the Association, shall have a vote upon all subjects coming before the Board of Directors.

Members Shall Hold Primary Elections to Choose Delegates—Delegates Shall Select Directors in Each District

5. (a) The members in each county in each district shall meet annually for a primary election, to be held in the county and conducted, as, where and when specified by the directors; and shall select one delegate for every million or majority fraction of a million pounds of tobacco represented in the preceding year by the members in such county. The said delegates shall then meet where, when and as instructed by the directors and shall select one member in each district to be presented as the nominee to represent such district. Such nominee must be elected as director at the general meeting.

Voting By Mail

(b) If unable to attend, the members may vote at such primary meeting by mail on a signed ballot prepared under directions of the Board of Directors.

The first primary to select incorporating directors shall be held within thirty days after announcement of the completion of the minimum sign-up herein provided for.

District Always to Have Fair Representation

6. The Organization Committee, at least twenty days before the first primary meeting, and the Directors, by a majority vote, at least twenty days prior to all succeeding primary meetings, shall fix and specify or change the said districts and the counties included therein so as to maintain at all times fair and equitable representation of the tobacco-producing counties and districts included in the membership.

Board Will Have an Executive Committee

7. The Board shall appoint an Executive Committee of five directors to conduct the affairs of the Association, subject to the general control of the Board of Directors.

Local Branches Will Be Maintained

8. Informal local branches of the Association shall be created and maintained in every district, county and central locality. Each district shall have its own officers, who may attend the meetings of the Board of Directors and act in an advisory capacity.

The Association will provide uniform rules for such branches.

One Man—One Vote

9. Every member of the Association shall have one vote.

Entrance Fee, $5—Cash, Tobacco or Note

10. Every member shall pay an entrance or organization fee of $5.

Association Will Have Suitable Articles of Incorporation and By-Laws

11. The Association shall confine itself to the problems and marketing of tobacco and tobacco products only, and for its members only. It shall have suitable articles of incorporation and by-laws stating the purposes and powers of the Association; the rights and duties of members; manner of forfeiture of membership; value of property interest on withdrawal and any other necessary, pertinent and important points of organization as determined by the Organization Committee or the Board of Directors.

Organization Committee

12. The Association shall be organized by an Organization Committee composed of the following:

Robert W. Bingham, Louisville; Ralph M. Barker, Carrollton; Edward Bassett, Lexington; Waller Bennett, Richmond; Desha Breckinridge, Lexington; T. S. Burnam, Richmond; Johnson N. Camden, Versailles; Samuel Clay, Paris; W. A. Clements, Springfield; John T. Collins, Paris; T. J. Curtis, Richmond; L. A. Faurest, Elizabethtown; Harry Giovannoli, Lexington; H. B. Hanger, Jr., Richmond; Shelby T. Harbison, Lexington; Martin L. Harris, Rising Sun, Ind.; Price Headley, Lexington; J. R. Jones, Cynthiana; J. N. Kehoe, Maysville; the Rev. John F. Knue, McQuady; Bedford Mack'in, Frankfort; William A. McDowell, Lexington; Dr. Frank L. McVey, Lexington; Charles N. Manning, Lexington; L. L. Neale, Richmond; Stanley Reed, Maysville; N. C. Ridgeway, Falmouth; Joseph E. Robinson, Lancaster; W. E. Simms, Versailles; Fred C. Stilz, Lexington; James C. Stone, Lexington; Sunshine Sweeney, Lexington; B. A. Thomas, Shelbyville; C. L. Walters, Shelbyville; J. Quincy Ward, Cynthiana; John Woodford, Paris; C. A. Meek, Carrollton; J. A. Donaldson, Carrollton; George Powell, Bedford; Prentice Heath, Bedford; D. A. Bell, Bedford; R. B. Brown, Warsaw; B. F.

Mylor, Warsaw; A. T. Mills, Owenton; Charles Danner, Vevay, Ind.; John R. Crockett, Sharpsburg; J. S. Hocker, Stanford; J. W. Gaines, Lawrenceburg; J. N. W. McClure, Paris; Buckner Woodford, Paris; John W. Heflin, Flemingsburg; C. D. Asbury, Augusta; R. P. Taylor, Winchester; J. H. Sousley, Flemingsburg; Lewis L. Walker, Lancaster; Robert J. Denny, Nicholasville; James C. Averitt, Lebanon; Bush W. Allin, Harrodsburg; Samuel Houtchens, Chaplin; Herdy Myers, Carlisle; Chambers Perry, Mt. Olivet; Reuben F. Offutt, Georgetown; E. T. Holloway, Taylorsville; Robert S. Walker, Versailles; Lindsay Duncan, La Grange; C. O. Hempfling, Taylorsport; F. T. Logan, Danville; B. E. Allen, Lexington; V. S. Metcalfe, Dry Ridge; J. D. Craddock, Munfordville; A. D. Keith, Tolesboro; Clark B. Patterson, Mt. Sterling; Martin Light, McKinneysburg.

This committee may increase its membership from time to time as may be deemed necessary. The committee may elect new members in place of any who may resign or be unable to act and take such steps as it may deem advisable to secure subscribers for this agreement and members of the Association. There will be an Executive Committee of five members to conduct the detailed affairs of organization work. This Executive Committee shall be made up of Robert W. Bingham, Ralph M. Barker, James C. Stone, W. E. Simms and John T. Collins. It will be the duty of the Executive Committee to open headquarters, incur necessary obligations, make necessary expenditures and do any and all things incident and necessary to the executive work of carrying on the membership campaign. It will have all the powers of the full Organization Committee.

Seventy-five per cent of the Production in Kentucky, Indiana, Tennessee and Ohio Must be Signed Up

13. (a) If by November 1, 1922, signatures of tobacco growers or persons eligible for membership, covering at least three-fourths of the aggregate production of burley tobacco in Kentucky, Indiana, Tennessee and Ohio in 1920, shall not have been secured for this agreement, the Organization Committee shall so notify every subscriber at his address noted below, prior to November 15, 1922, and his signature and the agreement signed by him shall be deemed canceled.

[fol. 14a] Binding Agreement

(b) If the signatures of the growers of the said three-fourths shall be secured by the said date, November 1, 1922, then this agreement shall be binding upon all the subscribers in all of its terms and there shall be no right of withdrawal whatsoever.

Starts with 1921 Crop if You Secure the Sign-up

(c) If the said three-fourths is secured prior to November 15, 1921, the Organization Committee shall notify all subscribers and proceed to organize the Association as soon as practicable and shall

handle, in addition to the crops set out in the Marketing Agreement, whatever of the 1921 crop the grower has on hand, free of lien, at the date of notice of incorporation of the Association.

Statement of Committee Conclusive

(d) For all matters of production or signatures and for all statements of fact in connection herewith, the written statement of the Organization Committee, signed by its chairman, shall be absolutely conclusive, with or without notice to the subscriber.

Committee Keeps True Accounts

14. The Organization Committee shall keep a full, true and detailed account of expenditures, including salaries, fees and cost of every kind and shall have such accounts audited and render a written report thereof to the Board of Directors of the Association when organized; and shall thereupon turn over to the Association any balance remaining in its hands and free of obligation. If it is not so organized, such balance shall be prorated among the signers hereof.

Committee Authorized to go Ahead

15. (a) We do hereby authorize the Organization Committee, as the representative of all the subscribers, to take such steps as it may deem proper, especially in Kentucky, Tennessee, Ohio, Indiana, West Virginia and other Burley tobacco-growing States, to secure subscribers hereto; and, when the adequate number has been secured, to hold primary elections and have the signers select delegates to elect the organizing directors from among growers subscribing hereto, together with three public directors, conforming as closely as possible to the provisions of paragraph four; and to take all steps necessary and advisable to organize the Association.

Association to Keep up Organization Work

(b) The Association when organized shall make every reasonable effort to secure signatures of additional growers to the standard marketing agreement.

How You Secure, Finance and Control Any Plants You May Need for Curing, Drying, Processing, or Storing Any Tobacco

16. (a) After due investigation, the Association may cause a warehousing or other corporation to be organized in any community or district, or generally where any such need is indicated, by a written request of at least one hundred members, for the purpose of leasing, purchasing or constructing and operating warehouses, drying or curing plants, storehouses or factories, or other places, to handle, treat, process, manufacture and warehouse or store any or all of the

tobacco delivered by members of the Association. The Association, in all such cases, shall endeavor to acquire or lease existing warehouses and plants, especially where they are owned by growers.

Appropriate Name

(b) Such corporation shall have an appropriate name, indicating the district; and shall have common capital stock and preferred capital stock in amounts estimated as sufficient for their purposes by the directors of the Association.

Association Cannot Put Up Any Plants Against Desire of Members

(c) The Association shall send a written notice to every member in that district or generally, notifying the members of the intention to organize such a corporation, specifying the amount of capital stock involved; nature of plants; location of plants and specific purposes.

The members shall have two weeks within which to signify their dissent or disapproval of such a plant. If within two weeks of the mailing of such notices by the Association the majority fail to file written notices of such disapproval or dissent the Association shall proceed with its programme and shall organize the corporation as indicated.

Common Stock Has All the Voting Power—Only Members Can Own This

(d) The authorized common stock shall exceed in amount the authorized preferred stock. The common stock shall be sold only to members of the Association at par; but no member shall purchase originally or directly more than one share or enough to qualify as a director. The common stock shall have all the voting power of the corporation.

Preferred Stock has no Vote, but Has Guaranteed Dividends—Anybody Can Buy Preferred Stock

(e) The preferred capital stock shall be divided into five equal classes, all bearing 8 per cent cumulative dividends and having similar preferences subject to retirement with a bonus of 2 per cent at the rate of one class or one-fifth thereof annually, beginning June, 1923.

The preferred stock may be sold to any person, firm or corporation whatsoever.

Limitation on Stock Issues is Approximately Two-fifths of a Cent a Pound Each Year

(f) The original issue of preferred stock, including all five classes, shall not exceed two cents for each pound of tobacco of the 1920 crop covered by the membership of that district; but this amount may be increased proportionately as the membership increases.

Function of Corporation and Relations to Marketing Organization

(g) The Association shall make a cross-contract with the corporation, providing substantially as follows: That the corporation shall handle, process, dry, cure, condition, manufacture, treat, store, ship and deliver, all as required and directed by the Association, the tobacco delivered to it by and at the order of the Association. Such service will be on a nonprofit basis; and the corporation shall receive therefor only the actual costs of such operations and amounts, apportioned over the operation of any one season, sufficient to pay a dividend of 8 per cent on the outstanding common stock and the dividend on the outstanding preferred stock and to retire each of the five calendar years, beginning with 1923, one-fifth of the preferred stock, or one class thereof; and sufficient amounts for taxes, insurance, depreciation, betterment and commercial and secondary charges, all as the directors of the Association may instruct and limit the corporation and not otherwise.

The corporation will agree to do no buying or selling of tobacco whatsoever.

Public Warehouses

(h) Any warehouse shall be conducted as a public warehouse, with such charges as may be imposed through an official body or with such charges as are generally prevalent in the district; and any profits made from such operation as a public warehouse shall be utilized for payment of overhead expenses of the corporation.

How You Retire Preferred Stock

(i) The Association will retire each class of preferred stock and pay the dividends on the stock by deductions from the marketing proceeds of the members generally or within the respective districts in which or for whose use or benefit the warehouses, etc., are acquired or built and operated.

If, however, any central plants are purchased, constructed or leased, or operated for the general benefit of several or all of the districts, such deductions shall be made from the proceeds of the several or all districts, as the directors may determine conclusively, to conform to the general extent of the beneficial purpose.

Growers Get Credit For All Deductions to Retire Stock

(j) As the preferred stock is retired the Association will calculate the value of the contribution from each grower's tobacco toward such retirement and toward payment of dividends on the common and preferred stock; and the corporation will credit and issue from time to time to each such member common stock in an equivalent amount, at the book value thereof, as conclusively established by the directors of the corporation as soon as the aggregate deductions equal the book value of one or more shares.

Marketing Agreement is Here Accepted

17. (a) The subscriber agrees (1) to execute, when requested by the Association, a Marketing Agreement in terms substantially the same as those set forth in the agreement herewith embodied; or (2) at the option of the Board of Directors to be bound by the terms of the following Marketing Agreement.

For such purposes signature to this Association Contract shall be deemed to all effects the same as signature to the said Marketing Agreement and as acceptance of the exercise of such option by the Board of Directors. Notice thereof shall be mailed to each subscriber at his address noted below.

[fol. 14b] This is an Application for Membership

(b) The subscriber here applies for membership in the Association when organized and expressly agrees that his signature to this Association Contract and to the Marketing Agreement, herewith embodied, and to this application for membership shall be irrevocable, except as provided in paragraph thirteen; and that he so agrees, in order to induce other growers to sign this agreement for his benefit as well as their own general benefit and the public welfare.

Acceptance of this application for membership and of the Marketing Agreement shall be deemed conclusive, upon the mailing of the notice by the Association; and such mailing and notice shall be conclusively established by the affidavit of the Secretary of the Association.

Burley Tobacco Growers' Co-operative Association Marketing Agreement

Member's Agreement with the Association

The Burley Tobacco Growers' Co-operative Association, a non-profit Association, hereinafter called the Association, first party, and the undersigned Grower, second party, agree:

This is for Co-operative Marketing

1. The grower is a member of the Association and is helping to carry out the express aims of the Association for co-operative marketing, for minimizing speculation and waste and stabilizing tobacco markets in the interest of the grower and the public, through this and similar obligations undertaken by other growers.

Grower Sells Tobacco to Association for Five Years

2. The Association agrees to buy and the grower agrees to sell and deliver to the Association all of the tobacco produced by or for

him or acquired by him as landlord or lessor, during the years 1922, 1923, 1924, 1925 and 1926.

If You Have a Crop Mortgage That Tobacco Does Not Have to Go to the Association if You Can't Control It.

3. The grower expressly warrants that he has not heretofore contracted to sell, market or deliver any of his said tobacco to any person, firm or corporation, except as noted at the end of this agreement. Any tobacco covered by such existing contracts or crop mortgage shall be excluded from the terms hereof for the period and to the extent noted, if the lien-holder insists upon the exercise of any right of possession or sale.

The Association Tells You Where to Deliver

4. (a) All tobacco shall be delivered at the earliest reasonable time after cutting or curing, to the order of the Association, at the warehouse or plant controlled or specified by the Association, or at the nearest warehouse, if the Association controls or specifies no warehouse or plant in that immediate district; or by shipment, as directed, to the Association; and by delivery to the Association of the indorsed warehouse or other receipts or bills-of-lading, properly directed.

Poor Tobacco is Penalized

(b) Any deduction or allowance or loss that the Association may make or suffer on account of inferior grade, quality or condition at delivery shall be charged against the grower individually.

Association Will Try to Standardize Methods

(c) The Association shall make rules and regulations and provide inspectors or graders to standardize and grade the quality and method and manner of handling, curing and shipping such tobacco and the grower agrees to observe any such rules and regulations and to adopt the grading established by the State and Federal authorities and the Association.

All Tobacco Will be Pooled for Each Year by Type and Grade

5. The Association shall pool or mingle the tobacco of the Grower with tobacco of a like type, grade and quality delivered in the same crop year by other growers. The Association shall classify the tobacco and its classification shall be conclusive.

The tobacco delivered in any crop year to any point at the order of the Association shall be handled in one major pool; and the minor pools shall be by type and grade.

Association Will Resell All Tobacco and Pay Net Proceeds to Grower—Costs of Operation and Overhead Will be Deducted, but the Association Forbidden to Make Any Profit for Itself.

6. The Association agrees to resell such tobacco, together with tobacco of like type, grade and quality delivered by other growers under similar contracts, at the best prices obtainable by it under market conditions, and to pay over the net amount received therefrom (less freight, insurance and interest), as payment in full to the grower and growers named in contracts similar hereto, according to the tobacco delivered by each of them, after deducting therefrom, within the discretion of the Association, the costs of maintaining the Association and handling, grading and marketing such tobacco; and of creating funds for credits and other general commercial purposes (said funds not to exceed 1 per cent of the gross resale price). The annual surplus from such deductions must be prorated among the growers delivering tobacco in that year on the basis of deliveries.

Every Grower Gets the Same Amount for the Same Type, Quality, and Quantity of Tobacco

7. The grower agrees that the Association may handle, in its discretion, some of the tobacco in one way and some in another; may sell some upon delivery; may cure or process or manufacture all or any portion thereof, but the net proceeds of all tobacco or tobacco products of like type, quality and grade, less charges, costs and advances, shall be divided ratably among the growers in proportion to their deliveries to each pool, payments to be made from time to time, until all the accounts of each pool are settled.

The Association may contract with the owners of re-drying plants to re-dry and store the tobacco delivered by the members of the Association.

The Tobacco Will be Sold Anywhere—for Export or Otherwise—Where it Will be Most Profitable

8. The Association may sell the said tobacco, within or without the United States, directly to manufacturers or exporters or otherwise, at such time and in such form and upon such conditions and terms as it may deem profitable, fair and advantageous to the growers, and it may sell all or any part of the tobacco with or through any other agency hereafter established, for the co-operative marketing of the tobacco of growers in other States throughout the United States, under such conditions as will serve the joint interest of the growers and the public; and any proportionate expenses connected therewith shall be deemed marketing costs under paragraph six.

The Association Can Raise Money to Make First Payment to Growers

9. The grower agrees that the Association shall borrow money in its name on the tobacco, through drafts, acceptances, notes or otherwise, or on any warehouse receipts or bills of landing or upon any accounts for the sale of tobacco or on any commercial paper delivered therefor. The Association shall prorate the money so received among the growers equitably, as it may determine, for each district and period of delivery.

The Association agrees to accept drafts drawn against it by the grower for any amount specified and determined by it, upon delivery of tobacco hereunder, and to assist the grower to discount such drafts, secured by the warehouse receipts, through the most advantageous banking system.

Offices or Plants Wherever They are Needed

10. The Association may establish selling offices, warehouses, plants, marketing, statistical or other agencies in any place.

You Can Stop Growing Tobacco if You Wish

11. The grower shall have the right to stop growing tobacco and to grow anything else at any time at his free discretion; but if he produces any tobacco, or acquires or owns any interest in any tobacco, as landlord or lessor, during the term hereof, it shall all be included under the terms of this agreement and must be sold only to the Association.

You do Not Have to Deliver Any Particular Amount

12. Nothing in this agreement shall be interpreted as compelling the grower to deliver any specified quantity of tobacco each year; but he shall deliver all the tobacco produced by or for him.

[fol. 14c] **You Deliver all the Tobacco you Raise**

13. (a) This agreement shall be binding upon the grower as long as he produces tobacco directly or indirectly, or has the legal right to exercise control of any commercial tobacco or any interest therein as a producer or landlord during the term of this contract.

(b) If this agreement is signed by the members of a co-partnership, it shall apply to them and each of them individually in the event of the dissolution or termination of the said co-partnership.

You May Make a Crop Mortgage—the Association Will Try to Help You Secure Standard Terms

(c) If the grower places a crop mortgage upon any of his crops during the term hereof, the Association shall have the right to take delivery of his tobacco and to pay off all or part of the crop

mortgage for the account of the grower and to charge the same against him individually.

The grower may place a crop mortgage upon his tobacco; and shall notify the Association prior to making any such mortgage. The Association will assist and advise the grower in any such transaction as far as it deems proper.

Statistics are Needed

14. From time to time the grower agrees to mail to the Association any statistical data requested, on the forms provided for that purpose by the Association.

All Contracts are Alike

15. The agreement is one of a series generally similar in terms comprising with all such agreements, signed by individual growers, or otherwise, one single contract between the Association and the said growers annually and individually obligated under all of the terms thereof. The Association shall be deemed to be acting in its own name for all such growers in any action or legal proceedings on or arising out of this contract.

The Grower Authorizes the Association to Provide Curing or Redrying Plants if it Needs Them

16. (a) The grower hereby expressly authorizes the Association to deliver to any warehousing or other corporation organized for co-operation with this Association any or all of his tobacco for handling, processing, or manufacturing, or storing; and to charge against his tobacco and his prorated share of the funds necessary to create a reserve, equivalent to one class of its preferred stock annually plus bonus, to retire the said class; and to pay the dividends on all outstanding stock thereof.

(b) The grower shall be charged for such deductions only on account of warehouses or plants within his district or within his benefit, as determined conclusively by the Association; and for such deductions the grower shall receive a proportionate interest in such corporations.

Any Old Crop Tobacco May be Delivered to the Association to Sell

17. If the grower has on hand, upon the date of mailing notice of the actual incorporation of the Association, any tobacco of the 1921 or any other crops, free of liens and capable of delivery, he shall deliver such tobacco to the Association, as it may direct, to be graded by the Association and marked by it, in pools wholly separate from all other deliveres hereunder, but generally in the manner here set forth.

Do Not Break the Contract—This is Expensive

18. (a) Inasmuch as the remedy at law would be inadequate; and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association should the grower fail so to sell and deliver all of his tobacco, the grower hereby agrees to pay to the Association for all tobacco delivered, consigned or marketed or withheld by or for him, other than in accordance with the terms hereof, the sum of five cents per pound as liquidated damages, averaged for all types and grades of tobacco, for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts.

You Will Get His Tobacco Anyway

(b) The grower agrees that in the event of a breach or threatened breach by him of any provision regarding delivery of tobacco, the Association shall be entitled to an injunction to prevent breach or further breach thereof and to a decree for specific performance hereof; and the parties agree that this is a contract for the purchase and sale of personal property under special circumstances and conditions, and that the buyer cannot go to the open markets and buy tobacco and replace any which the grower may fail to deliver.

Violators Pay the Costs of Fighting Them

(c) If the Association brings any action whatsoever by reason of a breach or threatened breach hereof, the grower agrees to pay to the Association all costs of court, costs for bond and otherwise, expenses of travel and all expenses arising out of or caused by the litigation and any reasonable attorney's fee expended or incurred by it in such proceedings; and all such costs and expenses shall be included in the judgment and shall be entitled to the benefit of any lien securing any judgment hereunder.

The Contract is Complete on its Face

19. The parties agree that there are no oral or other conditions, promises, covenants, representations or inducements in addition to or at variance wtih any of the terms hereof; and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

National Central Agency

20. The Association is expressly authorized to exercise any or all of the grading, inspecting, marketing or other powers or rights granted hereunder through any central agency to be organized for co-ordinating the activities of this similar co-operative marketing

associations in other States. The Association shall, if possible, enter into any contract for such purpose and may agree to pool the products delivered hereunder with products of similar variety, grade and quality delivered to generally similar associations under marketing agreements substantially the same in effect as this agreement; and to unite with any such associations in the joint purchase, construction, lease or use of facilities and to assume obligations therefor.

Any costs of maintaining such central agency shall be pro-rated among the said Associations on the basis of the gross sale proceeds from the products delivered by them respectively and shall be considered part of the costs and deductions provided for in Paragraph six.

The Association agrees to assist in forming such central agency as soon as any similar Association is organized in the United States. Read, considered, and signed by the grower, as of the date determined by the Association Contract, in the State hereinbelow indicated.

(End of Marketing Agreement.)

Minor Changes May be Made

21. These provisions are subject to minor modification or amendment by the Organization Committee on the suggestion of State officials or otherwise, so as to carry out the general purposes hereof.

All Contracts are the Same—There are no Favorites

22. It is expressly agreed that this instrument is one of a series substantially identical in terms. All such instruments shall be deemed one contract for the purpose of binding the subscribers to the same extent as if all of the subscribers had signed one such contract.

Read, considered, and signed at —— this — day of ——, 1921.

(Do not sign without reading.)

Grower: —— ——.

P. O. Address:——; County: ——; State: ——.

Production in 1920 was —, pounds; 1920 acreage was —. Share of 1920 crop I owned:—, 1920 production:— acres; my part as landlord (—) tenant (—) is —.

Check whether landlord ( ) or tenant ( ).

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed Jan. 2, 1925

The defendant, B. S. Grannis, Commonwealth's Attorney for the 19th Judicial District of Kentucky, moves the Court to dismiss the Petition herein for the following reasons:

(1) Because there is a misjoinder of parties plaintiff;

(2) Because the United States Court has no jurisdiction of the subject matter and of the cause of action set forth in the Petition;

(3) Because there is no Federal Statute which gives to the United States Courts power or authority to entertain suits and actions for a declaration of the rights of parties;

(4) Because the United States Court has no power or authority to act under the provisions of Chap. 83 of the Acts of 1922 of the General Assembly of Kentucky known as the "Declaratory Judgment Law" for the purpose of securing a declaration of the rights and duties of the plaintiffs under the said act of 1922;

(5) Because there is no diversity of citizenship between the plaintiffs and the defendant.

R. H. Hayes, J. Howard King, Stanley Reed, Allen, Botts & Ducan, Attorneys for the Defendant. Aaron Sapiro, of Counsel.

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER TO FILE DEMURRERS—Filed Jan. 12, 1925

This day came the defendant, by counsel and demurred specially to the petition herein, and the court not being fully advised takes time, and said special demurrer is filed and noted of record.

Came again the defendant, by counsel, and without waiving his special demurrer hereinbefore filed, now demurs generally to the petition and the court not being fully advised, takes time, and said general demurrer is filed and noted of record.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

SPECIAL DEMURRER—Filed Jan. 12, 1925

The defendant, B. S. Grannis, Commonwealth's Attorney for the 19th Judicial District of Kentucky, demurs specially to the Petition herein because this Court has no jurisdiction of the subject matter of the action.

Allen, Botts & Duncan, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

GENERAL DEMURRER—Filed Jan. 12, 1925

The defendant, B. S. Grannis, Commonwealth's Attorney for the 19th Judicial District of Kentucky, without waiving his Special Demurrer to the jurisdiction of the Court, hereinbefore filed, demurs generally to the Petition because it does not state facts sufficient to constitute a cause of action.

Allan, Botts & Ducan, Attorneys for Defendant.

[fol. 17] IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING SPECIAL DEMURRER—Filed Feb. 4, 1925

This cause coming on to be heard upon the Special Demurrer filed by the defendant to the jurisdiction of the Court, and said Demurrer having been argued by counsel for plaintiff and counsel for defendants, and the Court being advised, it is now ordered and adjudged that said Special Demurrer be and the same is hereby sustained, to which ruling the plaintiffs object and except.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed Feb. 16, 1925

The court having heretofore sustained the special demurrer of the defendant to the petition of the plaintiffs and the plaintiffs having failed to amend said petition, and the court being of the opinion that it has no jurisdiction of this action, it is now ordered and adjudged that said cause be and the same is hereby dismissed; and that plaintiffs take nothing by this suit; and that the defendant recover of the plaintiffs his costs herein expended. To all of which the plaintiffs object and except.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed Feb. 20, 1925

To the Honorable the Justices of the Supreme Court of the United States, or any Associate Justice thereof, or to the Honorable A. M. J. Cochran, District Judge of the United States District Court for the Eastern District of Kentucky:

[fol. 18] Your petitioners, The Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a tobacco business,

individually, respectfully represents that there is manifest error committed by the final judgment pronounced in this case on the 16th day of February, 1925, in and by which said final judgment this court assumed jurisdiction of the cause set forth in the petition of your petitioners and undertook to and did render a final judgment therein dismissing their said petition upon the sole ground of lack of jurisdiction, whereby said judgment became and is a bar to further proceedings in said court.

Wherefore, your petitioners considering themselves aggrieved, pray and order granting a writ of error from said judgment entered, as aforesaid, to the Supreme Court of the United States, as authorized by Section 5 of the Act of Congress of the United States, approved March 3, 1891, and prays this Honorable Court that said writ of error may be allowed solely upon said question of jurisdiction and that the transcript of so much of the record, proceedings, and papers upon which said judgment was made as may be necessary to present said question of jurisdiction on writ of error, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioners herewith file, and offer to file their bond in the penal sum of $500.00 and asks that the same be approved, and that the writ of error be granted.

J. M. Collins, Allan D. Cole, Counsel for Plaintiffs.

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR AND FIXING BOND—Filed Feb. 20, 1925

The plaintiff's petition having been dismissed by a judgment of this court upon consideration solely of the question of this court's jurisdiction; and the plaintiffs having prayed a writ of error to the Supreme Court of the United States on said question of jurisdiction it is now ordered that the writ of error be allowed; and it is further ordered that so much of the record and proceedings and papers upon which said order and decree was made as are necessary to present the said question of jurisdiction, and no more, be included in the record on writ of error.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR AND FIXING BOND—Filed Feb. 20, 1925

Now, on this 20th day of February, 1925, there is presented to the Honorable A. M. J. Cochran, District Judge of the United States for the Eastern District of Kentucky, a petition for a writ of error to the Supreme Court of the United States, a writ of error to

the Supreme Court of the United States, a citation directed to said defendant, in error B. S. Grannis, as Commonwealth's Attorney for the 19th Judicial District of Kentucky, citing and admonishing them to appear in the Supreme Court of the United States of America not exceeding thirty days from and after the day the said citation bears date, and an assignment of errors; which said petition for writ of error is allowed; said citation signed, said assignment of errors filed, and the order of the District Judge approving the writ of error bond in the sum of $500.00 which said bond is also filed.

A. M. J. Cochran, Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Feb. 20, 1925

Now come the above named plaintiffs in error, The Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a tobacco business, individually, by Allan D. Cole and J. M. Collins, their attorneys and say that in the record and proceedings in the above entitled matter there is manifest error in this, to-wit:

I

That the United States Court for the Eastern District of Kentucky erred in holding and deciding that the said court had no jurisdiction to try and determine said suit, and in rendering its judgment dismissing the petition of plaintiffs in error therein on that ground.

II

That said court erred in refusing to give effect to the constitution and laws of the United States in regard to the jurisdiction of the said court.

III

That said court erred in refusing to give effect to the commercial clause of Article I, section 8 of the Constitution of the United States and the 14th Amendment thereto in relation to an Act entitled, "An Act to regulate the sale of loose leaf tobacco at public auction in this Commonwealth" passed by the General Assembly of Kentucky in March, 1924, and being chapter 10 of the Acts of that session.

IV

That said court erred in refusing to give effect to section 24, subsection 14, Judicial code.

[fols. 21 & 22] V

That said court erred in refusing to give effect to section 914 of the United States Revised Statutes, or what is commonly known as "The Practice Conformity Act."

VI

That said court erred in refusing to conform to the provisions of and to give effect to an Act of the General Assembly of Kentucky passed March 23, 1922, being chapter 83 at page 235 of its said Acts and entitled "An Act to authorize courts of record to make binding declaration of rights, and providing the procedure by which actions to secure such declaration of rights are to be prosecuted and determined."

Wherefore, the said Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a tobacco business, individually, pray that the judgment and order of the said District Court of the United States for the Eastern District of Kentucky, brought on error herein, be reversed

J. M. Collins, Allan D. Cole, Counsel for Plaintiffs in Error.

Bond on Writ of Error for $500.00—Approved and filed Feb. 20, 1925; omitted in printing

---

[fol. 23] In United States District Court

Order and Præcipe for Transcript of Record—Filed Feb. 20, 1925

The above named plaintiffs having petitioned this court for writ of error from the order and judgment made in this cause on the 16th day of February, 1925, dismissing their petition on consideration of the question of jurisdiction only, and such writ of error, having, by order of this court, been granted on said question of jurisdiction alone, and the further order made therein that so much of the record and proceedings and papers upon which said decree was made as might be necessary to present the said question of jurisdiction, and no more, be included in the record on appeal.

Now, therefore, it is hereby ordered that the following pleadings, proceedings and documents on file in said cause be included in the record on appeal:

(1) The citation to be used herein requiring the defendant to appear in the Supreme Court of the United States on this appeal and proof of service thereof.

(2) The original petition at law, and amended petition with exhibit.

(3) Special demurrer filed by the defendant to the jurisdiction of the court.

(4) The general demurrer filed by the defendant.

(5) The minutes of the court and orders and judgments made in the case.

(6) All certificates made by the Clerk of this Court with reference to the proceedings, rulings, and judgments of the court herein.

(7) The petition for writ of error, order of the court granting such writ of error, and the said writ allowed, the assignments of [fol. 24] error, of the plaintiff upon this writ of error, and the undertaking on writ of error, and all orders of the court and of the Judge in Chambers relating thereto.

(8) The certificate of the Clerk of the correctness of the record on appeal in this cause.

(9) All orders of filings, and acknowledgment and proof of service of all papers mentioned above.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed Feb. 20, 1925

The President of the United States of America to the Hon. A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky, Greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea which is in said District Court, before you, between the Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a tobacco business, individually, plaintiffs, and B. S. Grannis as Commonwealth Attorney for the 19th Judicial District of Kentucky, defendant, a manifest error hath happened to the great damage of the said plaintiffs, The Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a tobacco business, individually, and it being fit that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, you are hereby commanded, if judgment be therein given, and then, under your seal, [fol. 25] distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington in the District of Columbia thirty days after date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. William H. Taft, Chief Justice of the Supreme Court of the United States this 20th day of February, A. D. 1925, and of the Independence of the United States the *194th*.

J. W. Menzies, Clerk of the District Court for the Eastern District of Kentucky, at Lexington, by Spencer L. Finnell, D. C.

CITATION—In usual form, showing service on B. S. Grannis; filed March 18, 1925; omitted in printing

---

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—Filed March 19, 1925

For good cause shown, it is now ordered by the court that the time for filing this record in the Supreme Court, be and the same is extended Thirty days from this 19th day of March, A. D. 1925.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, J. W. Menzies, Clerk of the United States District Court, for [fol. 27] the Eastern District of Kentucky, at Lexington, do hereby certify that this and the preceding 26 pages contain a true and correct copy of the Record in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said Court, at Lexington, Kentucky, this 27 day of March, A. D. 1925, and of the Independence of the United States of America the 149th year.

J. W. Menzies, Clerk United States District Court, Eastern District of Kentucky, by Spencer L. Finnell, D. C. (Seal U. S. District Court, East. Dist. of Ky., U. S. of America.)

[fols. 28 & 29] CITATION AND SERVICE—Omitted; printed side page 28 ante

---

[fols. 30 & 31] WRIT OF ERROR—Omitted; printed side page 30 ante

Endorsed on cover: File No. 31,024. E. Kentucky D. C. U. S. Term No. 354. The Liberty Warehouse Company and C. M. Jones, trading, etc., plaintiffs in error, vs. B. S. Grannis, as Commonwealth Attorney for the 19th Judicial District of Kentucky. Filed April 13, 1925. File No. 31,024.

IN THE

Supreme Court of the United States

October Term, 1925

No. 354

THE LIBERTY WAREHOUSE COMPANY AND C. M. JONES, TRADING, ETC.,

Plaintiffs in Error,

vs.

B. S. GRANNIS, AS COMMONWEALTH ATTORNEY FOR THE 19TH JUDICIAL DISTRICT OF KENTUCKY,

Defendant in Error.

Error to the United States District Court for Eastern District of Kentucky, Sixth Circuit

---

MOTION TO ADVANCE AND TRANSFER TO SUMMARY DOCKET, AND BRIEF IN SUPPORT THEREOF.

ALLAN D. COLE,
Maysville, Ky.,
J. M. COLLINS,
Maysville, Ky.,
Attorneys for Plaintiffs in Error

INDEX

AUTHORITIES CITED

CASES

IN THE

Supreme Court of the United States

October Term, 1925

No. 354

THE LIBERTY WAREHOUSE COMPANY AND C. M. JONES, TRADING, ETC.,
Plaintiffs in Error,

vs.

B. S. GRANNIS, AS COMMONWEALTH ATTORNEY FOR THE 19TH JUDICIAL DISTRICT OF KENTUCKY,
Defendant in Error.

MOTION TO ADVANCE AND TRANSFER TO SUMMARY DOCKET

Now come the plaintiffs in error, Liberty Warehouse Company, a corporation, and C. M. Jones, individually, by their attorneys of record herein, and move this

Honorable Court to advance and transfer to the summary docket the above styled cause pursuant to Rule 18, Subsection 7.

First, because there is presented for consideration the sole question of jurisdiction of the U. S. District Court for the Eastern District of Kentucky, as evidenced by the record, and the brief for plaintiffs in error on the merits filed herewith; and, second, because the case is of such a character as not to require extended argument.

ALLAN D. COLE,
J. M. COLLINS,
Attorneys for Plaintiffs in Error.

NOTICE OF MOTION

The defendant in error is hereby notified that the plaintiffs in error will on Monday, the 7th day of December, A. D. 1925, submit for the consideration of said court the foregoing motion and brief in support thereof hereto attached, all of which are herewith presented for your consideration.

ALLAN D. COLE,
J. M. COLLINS,
Attorneys for Plaintiffs in Error.

Copy of the foregoing notice and motion, together with brief on merits of the case, received this 31st day of October, A. D. 1925.

AARON SAPIRO AND
ROBERT H. HAYS,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

October Term, 1925

No. 354

THE LIBERTY WAREHOUSE COMPANY AND C. M. JONES, TRADING, ETC.,
Plaintiffs in Error,

vs.

B. S. GRANNIS, AS COMMONWEALTH ATTORNEY FOR THE 19TH JUDICIAL DISTRICT OF KENTUCKY,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT

MAY IT PLEASE THE COURT:

The plaintiffs in error, The Liberty Warehouse Company, a corporation, a citizen and resident of Kentucky, and C. M. Jones, individually, a citizen and resident of North Carolina, have for several years last past been engaged in the business of operating and conducting a loose leaf tobacco warehouse in the City of Maysville, Kentucky. In the conduct of said business dealings by plaintiffs in error, tobacco is sold at public auction on the floors of said Liberty Warehouse Company. The larger part of said tobacco so sold is grown in Kentucky but the residue is shipped into Kentucky from adjoining states and other states whereby plaintiffs in error are engaged in interstate commerce. (R., 1.)

The General Assembly of Kentucky at its session in 1924 passed an act entitled, "An Act regulating the sales of leaf tobacco at public auction in this Commonwealth", which is Chapter 10 of the Acts of 1924, as found on pages 14, 15 and 16 in the Acts of Kentucky for that year. Plaintiffs in error, conceiving a mere declaration of their rights to be an adequate remedy, filed a petition at law in the U. S. District Court for the Eastern District of Kentucky on December 11, 1924, against defendant in error for a construction of said act upon which the clerk of said court issued no summons, but inadvertently and erroneously issued a subpoena in chancery. Nevertheless, defendant in error, without objection entered his appearance to the suit at law. Pointing out its conflict with the constitution and laws of the United States the plaintiffs in error in their petition alleged that an actual controversy exists with respect to said Act of 1924 in that they and each of them have been threatened with serious civil and criminal penalties and punishment for the violation of said null and void act about to be enforced thereunder by reason whereof they could not continue the operate their business without serious financial loss amounting to confiscation of their rights, business and property. (R.. 2, 4, 5, 6.)

The Act of 1924 in question is as follows:

CHAPTER 10

"An Act regulating the *sales of leaf tobacco* at public auction in this Commonwealth."

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

That Section 4814b-1 to 4, inclusive, Kentucky Statutes, Carroll's Edition, 1915, be and the same is hereby repealed and the following enacted in lieu thereof:

1. That it shall be the duty of any tobacco warehouseman, corporation, firm or individual, who shall receive, or who shall undertake to receive or take care of leaf tobacco, for sale at public auction, whether with or without compensation or reward, to post or cause to be posted, a notice, in a conspicuous place upon the premises of said warehouseman, corporation, firm or individual, stating the number of pounds in the aggregate actually sold, and the average price per pound received on account of each day's sale. It shall further be the duty of said warehouseman, prior to any such sale, to post at a point in the office of said warehouse, convenient and accessible for public inspection a typewritten or printed list showing the true name and postoffice address of the owner and producer and the number of pounds of tobacco of each person, firm or corporation, whose tobacco will that day be offered for sale in said warehouse. *No* tobacco shall be delivered to or received by any warehouseman for sale at public auction, *unless* the true names and postoffice addresses of the producer and owner of such tobacco are furnished said warehouseman by the person delivering same.

2. It shall be the duty of said warehouseman to post said notice of sale not later than nine o'clock a. m. on the day following such sale or sales; to post said list of tobacco to be that day sold, not less than thirty minutes prior to sale of tobacco of any owner or producer.

3. Any warehouseman, corporation, firm or individual who shall fail or refuse to post the said notices in accordance with the provisions of this act shall be subject to a fine in a sum not less than $50.00 nor more than $100.00 for each day for so failing or refusing.

4. Any warehouseman, corporation, firm or individual who shall in said notice falsify the actual number of pounds sold or the average price thereof, or shall falsely list the name, postoffice address or number of pounds of tobacco of any producer or owner whose tobacco will that day be offered for sale, or shall furnish a false name or address

of the owner or producer to any warehouseman, shall be subject to indictment and upon conviction shall be fined $500.00 for each offense.

5. Owing to the existence of unnecessary litigation and confusion growing out of the delivery and sale of tobacco in Kentucky, an emergency is hereby declared to exist and this act shall take effect from and after its passage and approval by the Governor.

Approved February 27, 1924."

Consequently, plaintiffs in error, pursuant to the Act of Congress, known as "The Practice Conformity Act" and Section 267, Judicial Code, filed a petition at law in the U. S. District Court for the Eastern District of Kentucky in accordance with the practice and procedure set forth in Chapter 83 of the Acts of 1922 of the General Assembly of Kentucky at page 235, for the purpose of securing a declaration of their rights and duties under said Act of 1924 and for the purpose of having said court determine whether in the conduct of their business it would be necessary for them to comply with the provisions of the said Act of 1924 or whether Chapter 10 of the Act of 1924 is invalid in whole or in part; and, if so, in what part by reason of its alleged conflict with the constitution and laws of the United States. (R., 2.)

Said Act of 1922 is as follows:

CHAPTER 83

"An Act to authorize courts of record to make binding declaration of rights, and providing the procedure by which actions to secure such declaration of rights are to be prosecuted and determined.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. In any action in a court of record of this Commonwealth having general jurisdiction where-

in it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

2. Any person interested under a deed, will or other instrument of writing, or in a contract, written or parol, or whose rights are affected by statute, municipal ordinance, or other government regulation, or who is concerned with any title to property, office, statute or relation; or who as fiduciary or beneficiary is interested in any estate, provided always that an actual controversy exists with respect thereto; may apply for and secure a declaration of his rights or duties, even though no consequential or other relief be asked. The enumeration herein contained does not exclude other instances wherein a declaratory judgment may be prayed and granted under Section 1 of this act, whether such other instance be of a similar or different character to those so enumerated.

3. Declaration of rights and determination of questions of construction, as herein provided for, may be obtained by means of proceedings at law or in equity, or by means of a petition on either the law or equity side of the court, as the nature of the case may require; and insofar as a declaration of rights is the relief asked, the case may be docketed for early hearing as in the case of a motion.

4. Further relief, based on a declaratory judgment, order or decree, may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief, either in the same proceeding wherein the declaratory judgment, order or decree was entered, or in an independent action. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment, order or decree, to show

cause why further relief should not be granted forthwith.

5. Any party aggrieved by a declaratory judgment, order or decree, rendered in the Circuit Court, may within sixty days after such judgment, order or decree has become final, unless the time be extended by the court, but in no event in courts of continuous session beyond 120 days from the time that such judgment, order or decree became final, and in other courts beyond a day in the succeeding term to that in which the judgment, order or decree became final; take and perfect an appeal to the Court of Appeals in the manner now provided by law for appeals. Such appeal shall be at once docketed in the Court of Appeals, and may be advanced for immediate hearing and submission. The Court of Appeals shall prepare proper rules as to arguments and briefs applicable to cases brought before it under this act, and advanced as above prescribed.

6. The court may refuse to exercise the power to declare rights, duties, or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances. The appellate court in its consideration of the case, shall not be confined to errors alleged or apparent in the record. When, in its opinion, further pleadings or proof is necessary to a final and correct decision of the matters involved, or that should be involved, it shall remand the case for that purpose; or if in its opinion the action is prematurely brought, or where a ruling in the appellate court is not considered necessary or proper at the time under all the circumstances, it may direct a dismissal without prejudice in the lower court.

7. When an action or proceeding under this act shall involve the determination of an issue of fact triable by a jury, such issue may be submitted to a jury in the form of interrogatories, with

proper instructions by the court, whether a general verdict be rendered or required or not.

8. The parties to a proceeding to obtain a declaratory judgment, order or decree, may stipulate with reference to the allowance of costs and in the absence of such stipulation the court may make such award of costs as may seem equitable and just.

9. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the petition and be entitled to be heard.

10. This act is declared to be remedial; its purpose is to make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty and insecurity with respect to rights, duties and relations, and is to be liberally interpreted and administered.

11. The word 'person' wherever used in this act, shall be construed to mean any person, partnership, joint stock company, incorporated association, or society, or municipal or other corporation of any character whatsoever.

12. All statutes or laws in conflict or inconsistent with the provisions of this act, are hereby repealed. It is intended that this act shall be valid to the fullest extent possible; and that the validity, if any, of any part or feature thereof, shall not affect or render the remainder of the act invalid or inoperative.

13. This act shall take effect from and after its passage.

Approved March 23, 1922."

Thereupon, defendant in error filed a special as well as a general demurrer to the petition. The special demurrer was sustained on February 16, 1925, and judgment without a written opinion was entered dismissing the petition upon the ground of lack of jurisdiction. (R., 23.) Thereafter, to-wit, on February 20, 1925, the court entered the following order:

> "The plaintiffs' petition having been dismissed by a judgment of this court upon consideration solely of the question of this court's jurisdiction and the plaintiffs having prayed a writ of error to the Supreme Court of the United States on said question of jurisdiction, it is now ordered that the writ of error be allowed; and it is further ordered that so much of the record and proceedings and papers upon which said order and decree was made as are necessary to present the said question of jurisdiction, and no more, be included in the record on writ of error." (R., 24.)

Therefore, the sole question presented to this court is whether the U. S. District Court for the Eastern District of Kentucky erred in refusing to entertain jurisdiction.

Assignment of Errors

Now come the above named plaintiffs in error, The Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a tobacco business, individually, by Allan D. Cole and J. M. Collins, their attorneys, and say that in the record and proceedings in the above entitled matter there is manifest error in this, to-wit:

I

That the United States Court for the Eastern District of Kentucky erred in holding and deciding that the said court had no jurisdiction to try and determine said

suit, and in rendering its judgment dismissing the petition of plaintiffs in error therein on that ground.

II

That said court erred in refusing to give effect to the constitution and laws of the United States in regard to the jurisdiction of the said court.

III

That said court erred in refusing to give effect to the commercial clause of Article 1, Section 8, of the Constitution of the United States and the 14th Amendment thereto in relation to an act entitled, "An Act to regulate the sale of loose leaf tobacco at public auction in this Commonwealth", passed by the General Assembly of Kentucky in March, 1924, and being Chapter 10 of the Acts of that session. That said court erred in refusing to give effect to Section 24, Subsection 14, Judicial Code.

IV

That said court erred in refusing to give effect to Section 914 of the United States Revised Statutes, or what is commonly known as "The Practice Conformity Act".

V

That said court erred in refusing to conform to the provisions of and to give effect to an Act of the General Assembly of Kentucky, passed March 23, 1922, being Chapter 83 at page 235 of its acts and entitled "An Act to authorize courts of record to make binding declaration of rights, and providing the procedure by which actions to secure such declaration of rights are to be prosecuted and determined".

Wherefore, the said Liberty Warehouse Company, a corporation, and C. M. Jones, trading and doing a tobacco business, individually, pray that the judgment and order of the said District Court of the United States for the Eastern District of Kentucky, brought on error herein, be reversed.

Contentions of Plaintiffs in Error

The plaintiffs in error, in asking a reversal of the judgment of the lower court, contend, as more specifically set forth in their assignments of error, that, irrespective of citizenship, in as much as in their petition at law, they alleged and showed the Act of 1924 to be in conflict with the constitution and laws of the United States (R., 4, 5, 6), it was the duty of the United States District Court for the Eastern District of Kentucky, first, to entertain jurisdiction; and, second, to construe the act and determine the controversy, so far as practicable, pursuant to the practice provided in the Act of 1922, known as the Declaratory Judgment Law.

ARGUMENT

I

Jurisdiction

Whatever procedure the court might have determined appropriate, whether if a mere declaration of rights proved an insufficient remedy, upon motion of plaintiffs in error, pursuant to Kentucky Civil Code of Practice, Section 10, after declaration of their rights, the case should then have been transferred to equity and two judges called in pursuant to Section 266, Judicial Code, to determine their right to further relief by in-

junction or not, it is submitted that, in any event, the lower court erred in refusing to entertain jurisdiction; because the petition alleged the existence of an actual controversy involving the threatened confiscation of their rights, business and property under said Act of 1924, claimed to be null and void, by reason of a provision in Section 1 thereof that *no* tobacco shipped from other states whether in original packages or hogsheads or not shall be delivered or received by any warehousemen for sale at public auction in Kentucky, *unless,* etc., and its conflict with the constitution and laws of the United States. For, manifestly, as the act has not been construed to apply solely to intrastate commerce it follows that the State of Kentucky has no power to burden or regulate interstate commerce or by fines and penalties to lay an embargo upon or to prevent the growers of tobacco in Missouri, West Virginia and Ohio or any other state from delivering tobacco by railroad, steamboat, automobile trucks or otherwise to plaintiffs in error; or likewise to prevent plaintiffs in error from receiving the same to be sold in due course at public auction in Kentucky. (Judicial Code, Section 24, Subsection 14; *South Covington and Cincinnati Street Railway Co. vs. Newport,* 259 U. S. 98; *Shafer vs. Farmers' Grain Co.,* decided by this court May 4, 1925; *Austin vs. Tenn.,* 179 U. S. 343; *Cook vs. Marshall County,* 196 U. S. 261; *Leisy vs. Hardin,* 135 U. S. 100, 5 R. C. L., pages 765 and 770; *In re Sanders,* 52 Fed. 802; *State vs. Jacobson,* 80 Ore. 648; *Collins vs. New Hamp.,* 171 U. S. 33; *Crutcher vs. Kentucky,* 141 U. S. 47.)

II

Procedure

Whether the procedure provided by the Act of the General Assembly of Kentucky on March 23, 1922, Chap-

ter 83, at page 235, in respect to declaration of rights was available to plaintiffs in error depended upon the existence of an "actual controversy". That an actual controversy existed entitling plaintiffs in error to invoke the procedure in question has been expressly held by the Court of Appeals of Kentucky in the case of *Jewell Tobacco Warehouse Co., etc., vs. Kemper,* 206 Ky. 667; *State of Kansas ex rel. Hopkins vs. Grove,* 19 A. L. R. 1116 and notes thereto; dissenting opinion by Sharpe, J., in *Anway vs. Grand Rapids R. R. Co.,* 12 A. L. R. 44 and the illuminating notes thereto.

Since the U. S. District Court for the Eastern District of Kentucky derived its jurisdiction pursuant to Section 24, Subsection 14, Judicial Code, and not from said Act of 1922, the existence of "an actual controversy" merely called into operation Section 914, U. S. Revised Statutes, and required the lower court in this case at law to conform "as near as may be" to the procedure provided by said Act of the General Assembly of Kentucky in regard to declaration of rights. For, in the case of *Amy vs. Watertown,* 130 U. S. 301, this court said:

> "The statute is peremptory and whatever belongs to the three categories of practice, pleading and forms and modes of procedure *must* conform to the state law and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the Act of Congress is to be followed in preference to the laws of the state."

In the case of *Borland vs. Haven,* 37 Fed. 405-406, it is said:

> "It is merely procedure, in an action at law, especially given by the statutes. It is not an equity or an admiralty case and is general in its application. So Section 914, Rev. St. U. S., applies; *or if it confers a new right and affords a new remedy*

> *to enforce it,* a right and remedy so afforded will be enforced in a proper case in the national courts. (*Ellis vs. Davis,* 109 U. S. 500-503; *Bank vs. Franklyn,* 120 U. S. 747, 756-758.)"

Since Congress has prescribed no rule to the contrary, it follows that the U. S. District Court for the Eastern District of Kentucky should have entertained jurisdiction and adopted the procedure in question.

For the foregoing reasons it is earnestly insisted that the judgment of the United States District Court for the Eastern District of Kentucky dismissing the petition of plaintiffs in error is erroneous and should be reversed.

Respectfully submitted,

ALLAN D. COLE,
Counsel for Plaintiffs in Error.

J. M. COLLINS, *Maysville, Ky.,*
Of Counsel.

In the Supreme Court of the United States

October Term, 1926.

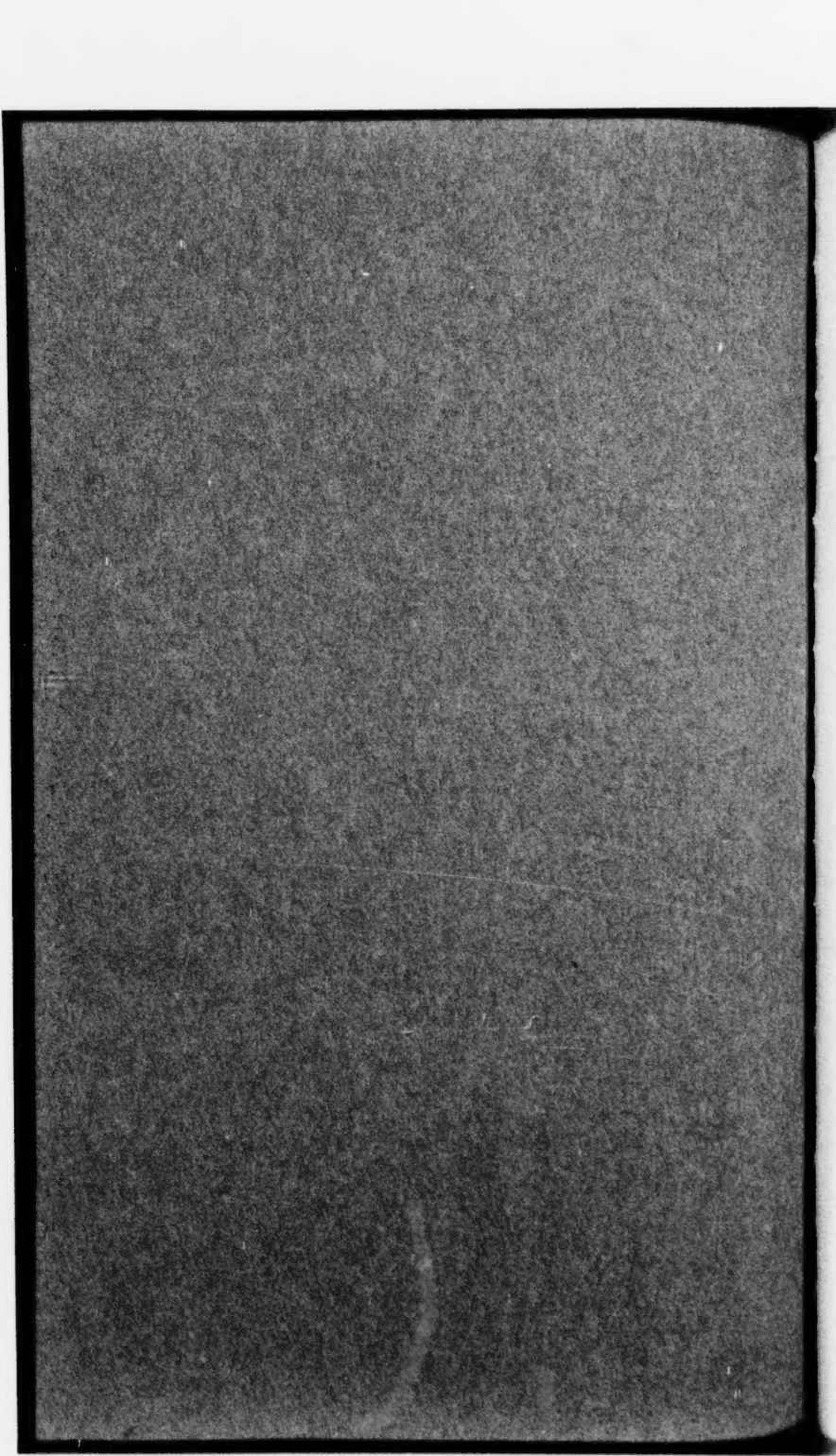
No. [redacted] 60

The Liberty Warehouse Company, and
C. M. Jones, Trading, &c., Plaintiffs in Error,

vs.

B. S. Clarke, as Commonwealth
Attorney for the 19th Judicial District
of Kentucky, Defendant in Error.

Reply Brief for Plaintiffs in Error.



INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

October Term, 1926.

No. 354

The Liberty Warehouse Company, and
C. M. Jones, Trading, etc., ------ Plaintiffs in Error,

vs.

B. S. Grannis, as Commonwealth
Attorney for the 19th Judicial District
of Kentucky, ---------- Defendant in Error.

Reply Brief For Plaintiffs In Error

May It Please the Court:

Statement

Before undertaking to reply in their order to the arguments of opposing counsel, it may be well to make a preliminary statement with respect to the Act of 1924 found on page 89 in their brief and on pages 4 to 6 in the original brief for plaintiffs in error.

In the first place, in Kentucky at least, one-fourth of those who raise tobacco are independent growers against whom the Act in question cunningly discriminates in favor of the other three-fourths who are members of a Kentucky corporation known as the Burley Tobacco Growers Cooperative Marketing Association. Now, the independent growers use the agency of loose leaf warehouse corporations in which they are not stockholders to sell their tobacco at public auction; whereas the other growers use the Association in which they are members as an agency to sell their tobacco either privately or at public auction. In the case of the independent growers the relation of bailor and bailee **technically** exists between them and the loose leaf warehouse which sell **for compensation,** whereby they and their agents are subjected to the penalties of the Act in question for sales at public auction; whereas in the case of the cooperative growers and the warehouses under the control of the said Association, the relation of bailor and bailee does not **technically** exist, because under a cunningly devised contract between them with reference to which the Act now in question was enacted, when their tobacco is delivered to their corporate agent for sale it thereupon becomes technically the property of their corporate agent; and, therefore, when their agent sells their tobacco it is technically and in form selling the property of the corporation, but in realty that of the members themselves and consequently, **in form** selling its own property it **is exempted** from the penalties of the Act now in question. In this way the corporate members can with impunity sell their products, either privately or **at public**

auction, without being subjected to its penalties, because their warehouses are not warehouses **within the meaning of the Act.**

In the second place, on examination of section one, it will be seen that the regulation of sales of loose leaf tobacco **at public auction** is not confined to the movement of leaf tobacco **within** the state of Kentucky, but that the movement of such commerce from other states of the Union and especially from the border counties of West Virginia and Ohio across the river to the loose leaf warehouses in Kentucky is also affected and included in these words. "No tobacco shall be delivered to or received by any warehouseman for sale at public auction unless the true names and postoffice addresses of the producer and owner of such tobacco are furnished said warehousemen, by the person delivering same."

In the third place, the hardship involved in section 2 will be understood when it is considered that when large numbers of independent growers bring their wagons loaded with tobacco while the sales are going on, each one has to wait thirty minutes before his tobacco can be sold; the result of which is, the sale is over before he is permitted to sell; whereby he is subjected to the expense and annoyance of waiting another day, and possibly longer, before he can be reached. Hence, the practical tendency of this provision is to discourage them with sales under such conditions and force them to become members of the Cooperative Association.

In the fourth place, it will be observed on reading section 3 that any warehouseman, corporation, firm or

individual failing or refusing to post the said notices in accordance with the provisions thereof shall be subjected to a fine in a sum not less than $50.00 or more than $100.00 for each day so failing or refusing.

In the fifth place, it will be observed, on reading section 4, that the corporations or persons who act as agents for the independent growers are further placed in constant jeopardy in making sales, because, if at any time, they incorrectly list the name of any producer, or his post office address or the number of pounds of his tobacco, the agents become liable at once to be penalized in the sum of five hundred dollars for each offense. Hence, the practical effect of these provisions is to intimidate the warehousemen and with fines to drive them out of business and thus to deprive the independent growers of their present method of marketing their crops and thereby to force them to become members of the Cooperative Association.

Let us now pass on to the consideration of opposing counsel's contentions in their order.

I.

"The Petition Does Not Show Any Ground For Invoking the Jurisdiction of the United States District Court."

In discussing section 24 of the Judicial Code counsel for defendant in error appear to have overlooked the fact of the express provision that original jurisdiction of the District Courts is not dependent upon diversity of citizenship or jurisdictional amount where the matter in controversy arises under the constitution

or laws of the United States, if the matter in controversy is included within the terms of Paragraph 14. For the District Courts are therein expressly given jurisdiction "of all suits **at law** or in equity authorized by law to be brought by any person to **redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state,** of any **right, privilege, or immunity secured by the Constitution of the United States,** or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." L. & N. R. R. Co. vs. Rice, 247 U. S. 201; First National Bank vs. Williams, 252 U. S. 504; Oklahoma Operating Company vs. Love, etc., 252 U. S. 332.

Now, the petition shows the following grounds for invoking the jurisdiction of the District Court:

A

The Act of 1924 Conflicts With Interstate Commerce Clause of the Federal Constitution

Now, it should, at the outset, be observed that the Act in question does not undertake to regulate **warehouse,** but undertakes to regulate **"the sale of loose leaf tobacco at public auction** in this Commonwealth."

In the first place, it will be observed that section one is directed against "any tobacco warehouseman, corporation, firm or individual, who shall receive or who shall undertake to receive or take care of leaf tobacco for sale at public auction, whether with or without compensation or award" regardless of whether re-

siding in Kentucky or out of it.

In the second place, it will be observed that the statute is violated whenever any such warehouseman, corporation, firm or individual, whether in or out of Kentucky, fails to post or cause to be posted a notice in a conspicuous place upon the premises stating the number of pounds in the aggragate actually sold and he actual price per pound received in each day's sales; and further if such warehousemen whether in or out of Kentucky prior to any such sale fails to post in the office of said warehouse and being accessible for public inspection, a typewritten or printed notice showing the true name and post office address of the owner and producer whether in Kentucky or out of it and the number of pounds of tobacco of each person, firm or corporation, whether in Kentucky or out of it whose tobacco whether shipped from without or within Kentucky will that day be offered for sale in said warehouse.

In the third place, it will be observed that any warehouseman, corporation, firm or individual whether residing in Kentucky or out of it operating a warehouse in Kentucky is arbitrarily penalized in a sum not less than $50.00 or more than $100.00 for each day's failure or refusal to post said notices, it matters not what the excuse or reason for such failure or refusal.

Indeed, it should also be observed that section one of the Act in question has the following unqualified provision, to-wit: "**No** tobacco shall be **delivered** or **received** by any warehouseman for sale at public auction, **unless** the true name and post office addresses of

the producer or owner of such tobacco are furnished said warehouseman **by the person delivering same,"**— even though it be an interstate shipment.

Now, when the construction of a statute enters into the question whether it was enacted in the exercise of police power, there is presented the question of the **power** of the state to burden commerce, and therefore, the construction of the State Courts in respect thereto is not binding on the United States Supreme Court. Morbans Louisiana T. R. & S. Ry Co. vs. Louisiana Board of Health, 118 U. S. 455; Brennan vs. Titusville 153 U. S. 289. Therefore, the question recurs: Has the State of Kentucky the power by the Act in question to lay any embargo upon or by fines and penalties to prevent the growers of tobacco in Missouri, West Virginia and Ohio or any other state in the United States, from delivering by railroad, steamboat, automobile trucks or otherwise their tobacco crops in bulk or original packages or otherwise to Kentuckq warehouses, or to prevent Kentucky warehousemen from contracting for and so receiving them from other states to be sold at public auction in Kentucky?

Declining to hold affirmatively that the Act in question relates solely and exclusively to transactions in intrastate commerce the Court of Appeals of Kentucky in Jewell Tobacco Warehouse Co. vs. Kemper, 206 Ky. 66, dismisses the contention therein made with the simple statement: "Nor does it interfere with interstate commerce." But in the subsequent case of Liberty Warehouse Company vs. Burley Tobacco Growers Cooperative Marketing Association,

208 Ky. 643, where a somewhat similar question arose the court gave its **reasons** which are in line with the contentions of defendant in error, as follows:

"Neither do we attach any importance to the interstate commerce feature attempted to be injected into the case by counsel for defendant.

In the first place, it is not shown that the tobacco of the member whose contract defendant is charged with assisting to violate ever moved in interstate commerce, i. e whether it was produced in this state and so moved. Again, it is extremely doubtful if it is continued in interstate commerce after it had been removed from another state (if that was the fact) to defendant's warehouse. Section 27 of the act does not attempt to penalize any of the steps necessary for such removal, and when the tobacco was deposited in defendant's warehouse the latter would not be liable to the penalties of the act, unless it did something subsequent thereto to complete the violation of the members contract with the association. Whatever, therefore, was thereafter done, would be in relation to a localized commodity and would appear to not involve the question of interstate commerce. But, beyond all that, we have seen that the Clayton Amendment to the Sherman Anti-Trust Law excludes such products from the provisions of the latter act, and thereby Congress relinquished its superior right to regulate interstate commerce with reference to them and restored the right of the states to do so as long as that condition existed. It is, therefore, clear that the case is not one in violation of the Sherman Anti-Trust Act for which

the actual amount of its alleged damages, or for treble that amount as attempted to be conferred by that act."

In other words, the court holds, in the first place, that the penalties should be imposed "if any person, firm or corporation," whether in or out of Kentucky, conducting a warehouse within the state of Kentucky, solicits or persuades or permits a member, in or out of Kentucky, to breach his marketing contract by merely "accepting or receiving such members products," in or out of Kentucky, "for sale or for auction or for display for sale," at such warehouse in Kentucky, whether it be accepted or received, for sale or for auction or for display for sale, in bulk or hogsheads or original packages or not; and, further, although the alleged tort begun in another state is "completed" in Kentucky, yet, after the tobacco reaches such warehouse, whether in bulk or hogsheads or original packages, it is then and there or thereafter so "accepted or received for sale or for auction or for display for sale" merely as a "localized commodity"; and, therefore, however commingled the acts may be, nevertheless whatever is done in relation to it "appears" to involve only the question of **intrastate** commerce..

In the second place, the court holds that the section in question is not in conflict with the commercial clause of the Federal Constitution and is therefore valid; because, it is asserted, Congress has relinquished its superior right to regulate interstate commerce with reference to farm products, including tobacco, and for the present has restored the right of the states to do so.

In response to the first proposition attention is

called to the opinion of this court in the case of Binderup vs. Pathe Exchange, 263 U. S. 309; wherein it is said:

"Does the circumstance that, in the course of the process, the commodity is consigned to a local agency of distribution to be by that agency held until delivery to the lessee in the same state put an end to interstate character of the transaction and transform it into one purely intra state? We think not. The **intermediate** delivery to the agency **did not** end and **was not intended** to end the **movement** of the commodity."

In the case of Stafford vs. Wallace, 258 U. S. 516, it is said: "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one state to another. **Such** transactions cannot be separated from the **movement** to which they contribute, and necessarily take on its character. The **commission men** are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in **this** aspect, merely **local** transactions. They create a local exchange of title, it is true, but they do not stop the flow; **they merely change the private interests** in the subject of the current, not interfering with, but, on

the contrary, being indispensable to, its **continuity.** The origin of livestock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well understood course of business. **The stockyards and the sales are necessary factors in the middle of this current of commerce."** Swift & Company vs. United States, 196 U. S. 375.

In the case of Shafer vs. Farmers Grain Co., decided by this court on May 4, 1925, it is said:

"Buying for shipment, and shipping to markets in other states, when conducted as before shown, constitutes **interstate commerce**—the **buying** being as much a part of it as the **shipping.** We so held in Lemke vs. Farmers Grain Co., 358 U. S. 50, following and applying the principle of prior cases. Later cases have given effect to the same principle. Stafford vs. Wallace, 258 U. S. 495. Binderup vs. Pathe Exch. 263 U. S. 291.

"Wheat—both with and without dockage, is a legitimate article of commerce and **the subject of dealings that are nation wide. The right to buy it for shipment,** and **to ship it,** in **interstate commerce,** is not a privilege derived from state laws, and **which they may fetter with conditions,** but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution. **The defendants make the contention that we should assume the existence of evils justifying the**

people of the state in the act. The answer is that there can be no justification for the existence of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of **all** the states that are affected."

In the case of Dahnke-Walker Milling Co., vs. Bondurant on writ of error to the Court of Appeals of Kentucky, 257 U. S. 290, it is said: "The commerce clause of the Constitution, art. 1 page 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, **but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale,** the commerce does not **end** with the **transportation,** but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. Brown vs. Maryland, 12 Wheat, 419, 446, 447, 6 L. ed. 678, 688, 689; American Steel & Wire Co. vs. Speed, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Supt. Ct. Rep. 365. On the same principle where goods are purchased in one state for transportation to another, **the commerce includes the purchase quite as much as it does the transportation.** American Exp. Co vs. Iowa, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. C. Rep. 182. This has been recognized in many decisions construing the

commerce clause. Thus it was said in Welton vs. Missouri, 91 U. S. 275, 200, 23 L. Ed. 347, 349: "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchases, sale, and exchange of commodities." In Kidd vs. Pearson, 128 U. S. 120, L. Ed. 346, 350, 2 Inters. Com. Rep. 232, Sup. Ct. Rep. 6, it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In United States vs. E. C. Knight Co., 156 U. S. 1, 13, 39 L. Ed. 325, Sup. Ct. Rep. 249, "contracts to buy, sell or exchange goods to be transported among the several states were declared part of interstate trade or commerce. And in Addyston Pipe & Steel Co. vs. United States 175 U. S. 211, L. Ed. 136, 147, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the Contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

In the case of Lemke vs. Farmers Grain Co., 258 U. S. 59, it is said:

"It is contended that these regulations may stand

upon the principles recognized in decisions of this court which permit the state to make local laws under its police power, in the interest of the welfare of its people, which are valid, although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the states. **This has no application where the state passes beyond the exercise of its legitimate authority, and undertakes to regulate interstete commerce by imposing burdens upon it."**

"Again, **Tobacco** is a product which has been recognized by custom, as well as by Acts of Congress as a fit subject for barter and sale and is **one** of the subjects, **national in character,** which it is within the exclusive power of Congress to regulate." Austin vs. Tenn. 179 U. S. 343; Cook vs. Marshall County, 196 U. S. 261; Notes to 60 L. R. A. 640, 40 L. R. (N. S.) 866."

Moreover, in 5 R. C. L. at page 765, it is said: "The question whether the state police power to the extent of regulation or prohibition can be exerted on certain subjects because it is supposed that the use of the particular commodity is harmful and it is believed that its sale should be regulated or prohibited; has been considered with reference to several subjects, such as intoxicating liquors, cigarettes, and oleomargarine. While the denial of the right of a state to regulate or prohibit the sale of such commodities has been put upon the ground, **that they are well recognized articles of commerce** and that their **sale** could not be burdened or prohibited by a **state,** the **controlling** reason seems

to have been that, notwithstanding objection which might be taken to their use, **they have been recognized by the laws of Congress as legitimate articles of commerce."** Leizy vs. Harden, 135 U. S. 100.

Furthermore, in 5 R. C. L. at page 770, it is said: "It makes no difference with reference to the interstate character of a sale made on a contract for the purpose of goods which are to be shipped from another state that the goods are to be consigned to the shipper or the agent to whom the order is given and to be delivered to the agent on payment of the purchase price, nor is the transaction deprived of its interstate character by employing any other agency in the delivery of the purchased goods. And the fact that goods ordered by several purchasers are shipped in bulk to the agent and are delivered by the agent to the respective purchasers after breaking the bulk, makes no difference as to the interstate character of the sales."

Indeed, the rule is well settled that a statute, like the one in question, purporting to have been enacted to protect the public health, the public morals, the public safety, or to serve the public conveniences, must have some real, or substantial relation thereto and can, in no event, be allowed to operate so as directly to burden interstate commerce or even to **trench** upon these subjects which are within the exclusive power of Congress to regulate. This declaration was first enunciated by Chief Justice Marshall in the great case of Gibbons vs. Ogden, 9 Wheat 1. and its principles have been applied in the case of Hannibal & St. J. vs. Titusville 153 U. S. 289; M. K. & T. Ry. Co. vs. Haber,

196 U. S. 663; Schollenberger vs. Penn. 171 U. S. 1, Austin vs. Tenn. 179 U. S. 343.

Since the Act in question, under regulations therein prescribed and penalties denounced, forbids warehousemen in all the states of the Union conducting warehouses in Kentucky from receiving or shipping their products of Burley Cooperative Growers into Kentucky for sale at public auction over the floors of loose leaf warehouses, regardless of the nature of the contracts under which the shipments are made, or the manner and condition in which the products are shipped, except with the burdens thereby imposed, it follows that the Act in question directly interferes with the transportation, by land or water from one state to another, which transportation is itself interstate commerce. Phil. & Southern S. S. Co. vs. Penn. 122 U. S. 326.

Indeed, every act of Congress extends to every part of interstate commerce, and to every instrumentality or agency, by which it is carried on; and the full control of subjects committed to its regulation cannot be denied or forfeited by the **commingling** of interstate operations." Minn. Rates Cases, 230 U. S. 362.

In the case of Vance vs. Vandercook Co. 170 U. S. 344, it is held that the power to ship merchandise from one state into another carried with it, as an incident, the right of receiver of the goods to sell them in original packages, sate regulation to the contrary, notwithstanding, unless Congress recognized the power of the state to control the incidental right to sell in original packages.

In the case of Ex parte vs. Jervey, 66 Fed. 959 and Jervey vs. The Carolina, 66 Fed. 1013, it is held that a state statute declaring it to be a misdemeanor, punishable by fine or imprisonment for any person except as provided in the Act to **bring into the state,** by means or mode of carriage, any liquor or liquors, containing alcohol, is clearly a regulation of commerce."

In the case of Bowman vs. Chicago Ry. So., etc., 125 U. S. 498, it is said: "For the purpose of this policy, a state legislature has control exclusive of Congress within its territory, of all persons, things and transactions, of strictly internal concern—it cannot without the consent of Congress, express or implied, regulate commerce between its people and those of other states of the Union in order to effect its end, **however desirable such regulation may be."**

In Henderson vs. Meyer, 92 U. S. 259, it is said: "It is clear, from the nature of our complex form of government that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is **void,** no matter under what classes of powers it may fall, or **how closely allied to powers conceded to belong to the states."**

In re: Sanders, 52 Fed. 802, Judge Goff said: "I conclude, that the police power of the state cannot be held to embrace a subject confided exclusively to Congress by the Constitution of the United States. If the **subject matter** of state legislation is included in the exclusive grant of commercial power to Congress, then the state enactment is void, **even if it is passed in the**

exercise of the police power of the state. The authorities in support of this are numerous, and from them I cite: Railroad Company vs. Husen, 95 U. S. 465; Crutcher vs. Kentucky, 141 U. S. 47; Leizy vs. Harden 135 U. S. 108.

In the case of State vs. Jacobson 80 Ore. 648, it is held that: "A statute regulating the sale of eggs shipped out or imported into the state from any foreign country, which requires every person selling or offering for sale any food or drink, the ingredients of which are in part composed of imported eggs shall display in a conspicuous place a sign of stated size and design bearing the words: "Imported Eggs Used Here" does not aim at the quality, condition or purity of the articles of food but **solely at the place from whence the article is shipped,** and does not call into requisition the police power of the state."

In the case of Collins vs. New Hamp. 171 U. S. 33, it is said: "It is clearly plain that if the state has not the power to absolutely **prohibit** the sale of an article of commerce like oleomargerine, in its true state, it has not power to provide that such article shall be **colored,** or rather **discolored,** by adding a foreign substance to it in the manner described in the statute."

So, likewise, in the case at bar, if the state has no power absolutely to prohibit the transportation and sale of tobacco, it has no power to provide penalties amounting to prohibition of sales thereof except at a particular place and in a particular way, and thus arrest the continuous flow of interstate commerce.

In response to the second proposition, attention

is called to the opinion of this court in the case of Duplex Printing Press Co. vs. Deering, 254 U. S. 469. wherein it is said: "As to section 6, it seems to us its principal importance in this discussion is for what does **not** authorize, and for the limit it sets to the impunity conferred.

The section assumes the normal objects of a labor organization to be legitimate and declares that nothing in the Anti-Trust Laws shall be construed to forbid the existence and operation of such organization, or to forbid their members from **lawfully** carrying out their legitimate objects, and that such organization shall not be held in **itself** merely because of its existence and operation, to be an illegal combination or conspiracy in restraint of trade. But, there is nothing in the section to **exempt** such an **organization** or its **members** from accountability where **it** or **they** depart from its **normal** and **legitimate** objects and engage **in actual combination or conspiracy in restraint of trade.** And by no fair or permissible construction can it be taken as authorizing **any** activity otherwise unlawful, or enabling a normal lawful organization to become a **cloak** for an illegal combination or conspiracy in restraint of trade as defined by the Anti-Trust Laws."

In conclusion, if it be contended that the Act in question refers **solely** to intra-state commerce, why did not the Court of Appeals of Kentucky say so? For a statute which **interferes** with interstate commerce, cannot be construed as applicable **only** to intra-state commerce; because it could not be thus construed without being so remodeled that it would be a mere speculation,

whether the Legislature would pass it in the new form. Meyer vs. Wells, 223 U. S. 298.

But let us now pass on to the consideration of another constitutional objection to the Act in question.

B

The Act In Question Conflicts With the 14th Amendment to the Federal Constitution

Now, in determining the legality of classification for legislative regulation, it is necessary to consider not only the **subject** to be regulated but also the character, extent, and purpose of the regulation, as well as, the classes of persons legally and naturally affected thereby and especially the classification and regulation which the Act in question adopts. Consequently, the question at once arises whether all those belonging to the class legally and naturally affected by the so called police regulation, are contained in the class therein made, or whether any are illegally excluded therefrom.

For, it is a well established principle that a provision not objectionable on its face may be adjudged unconstitutional because of **its effect in operation.** Genaral Oil Co. vs. Crance, 209 U. S. 211; State vs. Clement National Bank, 84 Vt. 167.

"If persons under the same circumstances and conditions are treated differently the Act in question does not classify, but arbitrarily discriminates." Soon Hing vs. Crowley, 113 U. S. 702; Ry Co. vs. Beckwith, 129 U. S. 26; American Sugar Refining Co. vs. Louisiana, 179 U. S. 89; Find also McFarland vs.

American Sugar Refining Co., 241 U. S. 79.

In other words, the Act in question takes what might be termed a natural class of persons, to-wit: growers of tobacco, splits that class in two, namely, (1) those who dispose of their products over the floors of loose leaf warehouses at public auction and (2) those who do not; and then arbitrarily treats the dissevered parts of the original unit as two classes and subjects each to different rules or provisions of law.

To make this contention plain it becomes necessary to consider the Act in question in relation to the Bingham Law of Kentucky under which the Burley Association operates and which affects growers of tobacco who do **not** sell their products over the floors of **loose leaf tobacco warehouses.**

First of all, in section one of the Bingham Act, which is 883 f-l, Ky. Statutes, its public policy is boldly declared to be: "To stabilize the marketing of agricultural products." Now, it is submitted, the word "stabilize" means and can only mean that power is thus attempted to be given to corporations organized under the Bingham Act, artificially to do away with the fluctuation of prices arising out of the operation of the law of supply and demand.

In section 883 f-17 of Kentucky statutes, it is provided that when members contract and sell their products to the association, **it shall be conclusively held that title to the products passes absolutely and** unreservedly, except as to recorded liens, to the association **upon delivery.** The significance of this provision will

be pointed out later on.

In section 883 f-1 Ky. Statutes, growers of tobacco in such associations are **exempted** from the provision of law in conflict with the Bingham Act and from any and all existing laws applying to agricultural products in the possession or under the control of the individual producer on delivery of such products to it by its farmer members.

In section 883 f-23 Ky. Statutes, it is provided that growers of tobacco through associations organized under the Bingham Act may form, operate, own and control warehousing corporations. The significance of this section will also be pointed out later on.

In section 883-27, Associations organized under the Bingham Act, having been previously given a right of action for liquidated damages against members for a breach of contract, are given a further right of action against a third party for inducing a member of the pool to break his contract; which is special privilege enjoyed by no individuals and by no other corporations and is contrary to the common law of Kentucky, as declared by the Court of Appeals in the case of Chambers vs. Marshall vs. Baldwin, 91 Ky. 121; and besides attorneys fees are allowed to these associations in such cases, but none are allowed to the defendants therein, contrary to the 14th Amendment.

For in the case of Atchinson, etc., Rio vs. Matthews, 174 U. S. 104, it is said: "It cannot pick out one individual or one corporation and enact that whenever he or it is sued the judgment shall be for

double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary and impose upon such class special burdens and liabilities."

In the case of Builders Supply Depot vs. O'Connor, 150 Cal. 256 it is held that in an ordinary action the allowance to plaintiff of an attorney's fee if he be victorious in the trial is discriminatory when no such allowance is provided for by the statute for the defendant in case he prevails. See also Olegschloger vs. Stephenson, 24 Okla. 760; Chicago etc., Ry., Co. vs. Mashore, 21 Okla. 275.

In section 883 f-28 Kentucky Statutes, there is further provision: "Any association organized **hereunder** shall be deemed **not** to be a **conspiracy** nor a **combination in restraint of trade** nor an **illegal** monopoly; nor an attempt to lessen competition nor to fix prices arbitrarily or to create a combination or pool in violation of any law of this state; and the marketing **contracts** and **agreements** between the **association** and its **members** and any agreements authorized in this Act shall be considered not to be illegal, nor in **restraint of trade** nor contrary to the provisions of **any** statute enacted against **pooling** or **combination.**" The Sherman Anti-Trust Law and the Clayton Amendment to the contrary notwithstanding. Thus it will be seen that the Bingham Act fairly bristles with inequalities.

Manifestly, the framers of the Bingham Act were

of the same opinion as the Court of Appeals in the case of Potter vs. Dark Tobacco Growers Cooperative Association, 201 Ky. 441, namely: "That agricultural associations are absolutely exempted from the provisions of said Anti-Trust Law, even when the expressed object of the organization is a monopoly. But this Court seems to be of a different opinion and in the case of Duplex Printing Press Co., vs. Deering, 254 U. S. 469. Just as a tree is judged by its fruit, so must the constitutionality of these correlated laws be judged by their effect.

Now do these laws themselves have the effect of creating an illegal combination, and taken in connection with them, or standing alone, does the Act in question make an unconstitutional classification? Since the product raised by each grower under the Bingham Act, becomes the property of the Association **upon delivery,** and since the Association under the Bingham Act is allowed to own and control its own warehouse, it follows that, as it has already become the absolute owner of three fourths of the entire tobacco crop raised in the Burley District, this association of growers is not a **public warehouseman** within the meaning of the Act in question, **because the relation of bailor and bailee does not exist.** See 27 R. C. L. pages 950 and 951. Therefore, as it deals exclusively in the sale of its own tobacco and not that of another, it can with impunity, sell the same, either privately or **at public auction.** Hence, it is not subject or amenable to the provisions of the Act in question. Consequently, by means of these correlated laws these favored growers are **exempted** from the provision of the Act

in question; which is directed solely at growers of the product in other states of the Union and in Kentucky not members of the pool, who by means of interstate and intrastate transportation send their products to the loose leaf warehouses in Kentucky.

In 6 R. C. L. section 396, it is said: "The courts generally opposed to a recognition of farmers and of persons engaged in agricultural pursuits as forming a separate class within the limits allowed by the Federal constitution securing to all, the equal protection of the laws. Hence, it is that statutes purporting to prohibit the formation of trusts for the purpose of fixing the price or regulating the production of articles of commerce, but exempting from their provisions all persons engaged in agriculture and raising live stock, are unconstitutional as class legislation denying the equal protection of the laws to those not included in the exempted class. Connolly vs. Union Sewer Pipe Co. 184 U. S. 540, 22 S. Ct. 43 1, 46 U. S. (L ed.) 479; Brown Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 A. S. R. 125, 57 L. R. A. 547. See also Davis vs. Mass. 167 U. S. 17, S. Ct. 731, 42 U. S. 71; New York etc., R. Co. vs. Bristol, 151 U. S. 567; Cantira vs. Tillman 54 Fed 974; Smith 38 Cal. 702; Parks vs. State 159 Ind. 211, 64 N. E. 862; State vs. Noheimer, 96 Me. 257, 52 Atl. 643; State vs. Laytham, 115 Me. 176; American Coal Co. vs. Allegheny County Comrs. 128 Me. 594; Com. vs. Abrahams 156 Mass. 57; People vs. Coolidge, 124 Mich. 644; McKinster vs. Sager, 163 Ind. 671.

In the case of Detroit Ry. Co., vs. Fuller, 205

Fed. 89, it is said: "The Court is, therefore, of the opinion that Act No. 95 in thus singling out the stockholders, bondholders and other creditors of the Detroit, Grand Haven and Milwaukee Ry Co., for the purpose of the taxes thereby imposed does constitute class legislation in contravention of the 14th Amendment and that said Act and the taxes assessed thereunder are thereby rendered void and of no effect."

The doctrine in the Connolly case, supra, has recently been invoked and applied by Mr. Chief Justice Taft in the illuminating case of Truax vs. Corrigan, 257 U. S. 335, wherein it is said. "That is the necessary effect of Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 46 (I ed) 679, 22 Sup. Ct. Rep. 431, where an Anti-Trust Act was held invalid under this same clause because it contained the excepting provision "that it should not apply to agricultural products or live stock while in the hands of the producer or raiser." That was a stronger case than this, because the whole statute was one dealing with economic policy and was a declaration of mala prohibita that had theretofore been lawful, from which it was strongly argued, that the exception was justified in the interstate interest of agriculture and was a proper exception by permissible classification. Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, **except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws then it is hard to conceive what would be.** To hold it, not to be, would

be, to use the expression of Mr. Justice Brewer, in Gulf G. & S. F. R. Co. vs. Ellis U. S. 150, 154, 41 (L ed) 666, 667, 17 Sup. Ct. Rep. 255, to make the guaranty of the equality clause "a rope of sand." See also, In re: Opinion of Justices 211 Mass. 618; United States vs. Armstrong 265 Fed. 687; United States vs. Yount 267 Fed 865.

We pass on now to consideration of another contention.

C

The Act In Question Interferes With the Operation of the Sherman Anti-Trust Law and the Clayton Amendment Thereto

We have seen that section 885 f-28 Ky. Statutes undertakes to confer upon associations organized under the Bingham Act the authority to operate as **monopolies.** Hence, the public policy of Kentucky is diametrically opposed to that of the Federal Government. Competition is free under the Sherman Anti-Trust Act and restrained under the Bingham Act. But under the operation of the Act in question, so far as farm products are concerned, the consumers thereof cannot permanently remain free in their right to avail themselves of the advantages of competition. For example, in handling tobacco the Burley Association, having already three-fourths of the output under its control by virtue of concerted action and the contracts with the numerous growers of the products, use the Act in question, **passed for its benefit, to ascertain what is paid for the various grades in the open market**

by the large buyers of the products for manufacturing purposes and by reason of such information is enabled to fix its own monopolistic prices for the grades at a higher rate, whereby the growers in the pool are enabled to get more for their products than the growers out of the pool who will thus ultimately and gradually be forced into the pool; all of which will inevitably result in the complete destruction of the loose leaf business of the growers in other states, as well as in Kentucky, and therefore, result in a complete monopoly and in the restraint of interstate commerce.

In the case of the United States vs. American Linseed Oil Co. 262 U. S. 388, it is said: **"THE PRICES OF OIL BECAME MORE STABLE."** Defendants continued with meticulous care actively to carry out the several provisions of the agreement amongst them; and that they intended further to pursue the plan unless restrained is not denied.

The obvious policy, indeed, the declared purpose of the arrangement was to submerge the competition theretofore existing amongst the subscribers and substitute "intelligent competition" or open competition to eliminate "unintelligent selfishness" and establish "100 per cent confidence," all to the end **that the members might stand out from the crowd as substantial co-workers under modern cooperative business methods."** In American Column & Lumber Co., 257 U. S. 377, 66 (L ed) 284, 21 A. L. R. 1093, 42 Sup. Ct. Rep. 114, we considered a combination of manufacturers got up to effectuate this new conception of confidence and competition and held it within the inhibition of the

Sherman Act **because of inevitable tendency to destroy real competition as long understood and thereby restrain trade.** Our conclusion there cannot be reconciled with the somewhat earlier opinion and judgment of the court below. They are in direct conflict.

The Sherman Act was intended to secure equality of opportunity and protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called "competition,"—the play of contending forces ordinarily engendered by an honest desire for gain. The statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods by agreements or otherwise, to accomplish such purpose ----------The words "restraint of trade" should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible a movement of trade in the channels of interstate commerce,—**the free movemeent of which it was the purpose of the statute to protect.** United States vs. American Tobacco Co. 221 U. S. 106, 179, 180, 55 (L ed) 663, 694, 31 Sup. Rep. 632 Charles A. Ramsay Co. vs. Associated Bill Posters, 269 U. S. 501, ante 746, 43 Sup. Ct. Rep. 450.

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it, **the court can see that its necessary tendency is to suppress competition in**

trade between the states, the combination must be declared unlawful. That such is its tendency, we think must be affirmed.

To decide otherwise would be wholly inconsistent with the conclusion reached in American Column & Lumber Co., vs. United States, supra."

In 19 R. C. L. section 21, it is said: "The purpose in all the prohibitions against monopolies and restraint of trade was to preserve the freedom of trade by means of free competition **between the traders themselves,** in order that the public should not be required to pay exorbitant prices for articles of common use and necessity. It was to prevent any man or set of men, from possessing the **power** arbitrarily to determine the price at which an article of common use shall be sold. The courts are practically unanimous in holding unlawful all agreements and combinations, **in whatever form or name,** by and between independent and unconnected manufacturers and dealers for the purpose of directly controlling the prices of their commodities, either by **restricting or monopolizing their supply,** or by express agreements to maintain specified prices. A combination to fix the price of an article of prime necessity was a criminal conspiracy at common law, and still is under the Anti-Trust Laws of most of the states. Necessity or **beneficient** purpose or **effect** can not justify a combination to raise prices. **That the price actually fixed is reasonable is no defense."**

And in section one thereof it is further said: "Any agreement or combination which directly operates, not alone upon the manufacture, but upon the

sale, transportation, and delivery of an article of interstate commerce, by preventing or restraining its purchase, sale or exchange, or by destroying, restricting or stifling free competition therein, **thereby regulates and restrains interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature and violates the statute.**

And there does not seem to be any doubt that combinations formed for the purpose of fixing and maintaining arbitrary and noncompetitive prices or rates are illegal under the statute. The act does not contemplate that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. **It is enough if its purpose and effect are necessarily to restrain interstate trade.** If it were otherwise, all combinations, in **restraint of interstate trade might be so expressed in words as to avoid the statute.** The true test would seem to be, not what the agreement professes, but what it accomplishes. The combination must be dealt with in view of the known facts which surround it when it was formed, and which attend it thereafter. To vitiate a combination such as the act of Congress condemns, **it need not be shown that the combination,** in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, **it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from such free competition.** A combination that has obtained a virtual monopoly of interstate trade in a given commod-

ity is clearly forbidden by the act. And a **business device** by which a considerable number of competing corporations are welded into a single corporate entirety which controls practically all the commerce of the country in a particular branch required for the economical production of a necessity of mankind in such monopoly. Trade and commerce are "monopolies" within the meaning of the Federal Statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control rates or prices. **It is not necessary that the power thus obtained should be exercised."**

Now, the Burley Association, having been given by the Bingham Act the right to "stabilize" prices and the power to control all of the tobacco raised by the growers, is now given by the Act in question the further power in Kentucky to compel a disclosure to it of the names of growers, number of pounds and prices paid by purchasers for the same grades of tobacco in the open market as its own whether it chooses to exercise that power or not to make a drive to force the independent growers into the pool and to force those same purchasers of tobacco to pay higher prices for the same products, to the ultimate destruction of the loose leaf business as heretofore pointed out, and the establishment of a powerful and hateful monopoly and the restraint of interstate commerce.

Indeed, in principle, or rather in its effect, what difference is there between a "business device" denounced by the courts and the cunning device in the Act in question, if thereby the supremacy of an Act of

Congress is defeated?

We pass on now to the propositions of defendant in error.

II.

"The United States Courts Do Not Have Jurisdiction of an Action to Secure a Mere Declaration of Rights and to Render a Declaratory Judgment Under a State Declaratory Judgment Law."

Since the prayer of the petition specifically asks for declaratory relief and also "for all proper relief," therefore, after a declaration of rights and determination of questions of construction by means of a suit at law pursuant to section 3 of the Declaratory Judgment Act, should such judgment be disregarded and the law sought to be enforced, the court, under the Kentucky practice, may afford consequential relief on its own motion pursuant to section 10, subsection 3, Ky. Civil Code, by a transfer of the cause to the equity side of the docket on the filing of an amendment to the petition setting up the threatened enforcement of an unconstitutional statute, and in accordance with the prayer "for all proper relief," call two judges pursuant to section 266 Judicial Code as amended February 13th, 1925, to determine the right to "consequential relief" by injunction.

For in Roberts, etc., vs. Redwine, 176 Ky. 799, it is said: "Considering now the judgment complained of, this court, in construing section 90 of the Code, has decided in a number of cases that where the facts

stated in the petition justified the relief granted, and defense, was made, the court would be authorized to render the judgment under the general prayer "for all proper relief." Bank vs. Coke, 45, S. W. 867, 20 Ky. Law Rep. 281; Travelers Insurance Co., vs. Henderson Mills, 120 Ky. 218, 85 S. W. 1090, 27 Ky. Law Rep. 653, 117 Am. St. Rep. 585, 9 Ann. Cas. 162, Heckling vs. Gehring, 100 S. W. 824, 30 Ky. Law Rep. 1108; Alexander vs. Owen County, 136, 420, 124, S. W. 386."

Now, instead of filing a suit in equity pursuant to section 266 Judicial Code and under the old law at once obtaining an ancillary remedy by injunction leaving the District Court at the conclusion of the litigation to declare the rights of the parties and determine the constitutionality of the Act in question, the plaintiffs in error, having also the right pursuant to the Conformity Practice Act of Congress, elected to avail themselves of the procedure provided by the Declaratory Judgment Law of Kentucky, and filed this suit in the District Court, which had an undoubted right and duty to hear and determine the controversy; because such procedure neither enlarged nor abridged substantive Federal rights both to have a state statute construed and the Conformity Practice Act applied.

For, in the case of United States Fidelity & Guaranty Company vs. Worthington & Co. 6 Fed. 2d 50, the Circuit Court of Appeals Fifth Circuit said: "Having the right to proceed **at law** in Alabama, plaintiff was entitled to the same remedy **in a Federal Court** in Alabama, notwithstanding equity might **also** have

jurisdiction on a bill for an accounting. North Ala. Dev. Co. vs. Orman 5 C. C. A. 22." Barrett vs. Virginia, 250 U. S. 473.

Moreover, in the case of Connecting Gas Co. vs. Imes, 11 F. (2d) 194, it is said: "Such would be the status of plaintiff's action, if brought in the state court under favor of section 12075. Its status is no different in this court, since, as we have seen, this court may grant relief according to the **state** law, **if its jurisdiction is properly invoked on any federal ground.** It is settled law that, **where a state statute creates a new right, the federal courts will enforce that right and grant relief, either** on the common law or the equity side, **as the nature of the right may require.** In conformity with this principle, the federal courts have uniformly granted relief under section 12075. See Cummings vs. National Bank, 101 U. S. 153, 157, 25 L. Ed. 903; Meyers vs. Shields (C. C.) 61 F. 713; Grether vs. Wright, (6 C. C. A.) 75 F. 742, 745, 23 C. C. A. 498; in the courts of record of the **State** within which the fed- Norwood vs. Baker, 19 S. Ct. 187, 172 U. S. 269, 292, 43 L. Ed. 443; City Ry. Co. vs. Beard (D. C.) 283 F. 313, 325_____

The mischief at which section 266 is directed was well understood at the time of its passage. It was **the tying up,** of the operation of an act of a state Legislature, or of an order of the state commission, in either case affecting the state at large, or the operations of a state commission, board, or officials. It was thought unseemly that one District Judge should be permitted to set aside the deliberate acts of a Legislature, or of

a commission or board of that nature, acting for or in the name of a sovereign state. It was not intended to deprive District Courts of their power to hear and decide ordinary lawsuits arising between a taxpayer and a county officer charged with the duty of collecting taxes.

A suit against subordinate officials of a state is never regarded as a suit against a state. See L. & N. Ry. Co. vs. Greene, 37 S. Ct. 683, 244, U. S. 522, 555, 61 L. Ed. 1291, Ann. Cas. 1917E, 97. The present situation falls within the principles stated and applied in Lykins vs. C. & O. Ry. Co. (6 C. C. A.) 209 F. 573, 126 C. C. A. 395; Cumberland Telephone & Telegraph Co., vs. City of Memphis (D. C. three judges) 198 F. 955.

The argument of convenience is also not without force in determining the intent of Congress. **The Amendment of February 13, 1925, to section 266 requires the final hearing to be before three judges."**

A.

"NO FEDERAL DECLARATORY JUDGMENT LAW"

In discussing this question opposing counsel at page 33 of their brief make the following statement: "The United States Courts are at present without jurisdiction of an action to secure a mere declaration of rights and cannot acquire such jurisdiction under the state law providing for the rendition of so called declaratory judgments." That United States Courts

cannot acquire such jurisdiction under a state law providing for the rendition of so called judgments is a correct statement and requires no argument. But, the further statement that "the United States Courts are at present without jurisdiction of an action to secure a mere declaration of rights" is open to argument.

In support of their contention that the District Courts are without power to make a declaration of rights, opposing counsel place their own construction upon an excerpt from a report of a Committee of the American Bar Association in regard to hearings on Senate Bill No. 3675, which excerpt is as follows: "Some doubt was expressed as to the necessity of the measure, **it being suggested that the remedies sought by the bill could be obtained under the present procedure,** a view which a careful examination of the proposed remedy would show to be without foundation."

If, on the one hand, in making this suggestion the Judiciary Committee of the Senate meant that the remedies sought by the Bill are at present actually available to all litigants in the Federal District Courts, such a view would be "without foundation," because only a minority of the states have enacted a Declaratory Judgment Law. But, if, on the other hand, the Judiciary Committee meant that the remedies sought by the Bill are actually available to some and potentially available to all the litigants in the Federal District Courts in all the states, such a view would not be "without foundation."

In other words, the Judiciary Committee of the Senate appear to be firmly convinced that instead of

enacting a Federal Declaratory Judgment Law at once applying to all the Federal District Courts in all the states of the Union, the better way to obtain uniformity in the same locality is pursuant to the Conformity Practice Act, to allow the states as they are prepared to determine for themselves when they will enact such a law which automatically will become available to litigants in the Federal District Courts in that state and thus by a gradual conformity without confusion as the states themselves are ready, the remedies sought by the Bill will be available to all and properly not before then.

Moreover to enact a Federal Declaratory Judgment Law for the states having no such law there would gravitate to the Federal District Courts in such states a much larger and dis-proportionate part of the litigation that would otherwise be brought in the State Courts. Indeed, is not the view of the Judiciary Committee of the Senate the better one, namely, that the remedies sought by the Bill can be obtained under the present procedure and that, in responding to the necessities of litigants in the various states, it is the wiser solution of the problem, instead of prematurely forcing such procedure upon the states, to allow them under the Conformity Practice Act, to determine for themselves the time and expediency of adopting such procedure?

In line with this interpretation of the meaning of the suggestion of the Judiciary Committee it will be pertinent to quote from the case of Lamaster vs. Keeler, 123 U. S. 376, wherein it is said:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This section is a re-enactment of section 5 of the Act of June, 1872, "to further the administration of justice," and was intended to assimilate the pleadings and the **procedure in common law cases** in the Federal court to the pleadings and procedure used in **such** cases eral courts are held. Much inconvenience had been previously felt by the profession from the dissimilarity in pleadings, forms and modes of procedure of the federal courts from those in the courts of the State. consequent upon the general adherence of the former to the common law forms of actions, pleadings, and modes of procedure; whilst the distinctions in such forms of action and the system of pleading and modes of procedure peculiar to them had been in many States abrogated by statute. The new codes of procedure did not require an accurate knowledge of the intricacies of common law pleading; and to obviate the embarrassment following the use of different systems in the two courts the section mentioned of the Act of 1872 was adopted. As said by this court in the case of Nudd vs. Burrows, 91 U. S. 441, its purpose "was to bring about **uniformity in the law of procedure in the federal and state courts of the same locality.**" It had its origin in the code enactments of many of the States. While

in the federal tribunals the common law pleadings, forms, and practice were adhered to, in the state courts of the same district, the simpler forms of the Civil Code prevailed. This involved the necessity, on the part of the Bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes.

The general language of the section, in the absence of qualifying provisions, would comprehend all proceedings in a cause from its commencement to its conclusion, embracing enforcement of the judgment therein. **The court which has jurisdiction of a cause has jurisdiction over the various proceedings which may be taken therein, from its initiation to the satisfaction of the judgment rendered.** Any practice, pleading, form or **mode of proceeding** which may be applicable in any stage of a cause **in a state court, would** therefore, **under the section in question,** in the absence of other clauses, **be also applicable in a like stage of a similar cause in a federal court.** The section would embrace proceedings **after judgment equally within those preceding its rendition."**

Hence we have as it were a Federal Declaratory Judgment law in evolution.

B.

"THIS ACTION DOES NOT PRESENT A CASE OR

COTROVERSY FOR JUDICIAL DETERMINATION"

In taking the position that this action does not present a case or controversy for judicial determination, opposing counsel are forced to assume and argue that, in passing upon the question whether or not the state statute conflicts with the Commercial Clause and the 14th Amendment to the Federal Constitution, the District Court, after passing upon the merits, would not be in a position to afford "consequential relief." But it has already been pointed out that, under their prayer for "all proper relief," plaintiffs in error would be entitled, under the Kentucky Practice, to have the court, upon amendment to the petition, to transfer the cause to equity; and, should the necessities of the case require, to grant injunctive relief. Failure carefully to examine the Kentucky Declaratory Judgment Law and the interpretation of the highest court of the state with respect to it has caused opposing counsel to confuse declaratory judgments with advisory opinions and decisions in moot cases.

For, in speaking of this law in Kelly etc., vs. Jackson etc., 206 Ky. 815, the Kentucky Court of Appeals said:

"But the above court undertook to decide a question that it was asked by an amended petition to settle for these parties. **There is no suggestion that an actual controversy exists. It appears to be a mooted neighborhood question. Courts are not provided for the settlement of arguments or differences of opinion,**

but actual controversies involving legal rights."

In the case of United States vs. Lenore, 207, Fed. 869 it is said: "Again, it has been uniformly held that judicial power can be exercised in the federal courts only when the proceeding takes the form of "a case" or "controversy" within the meaning of those terms as used in the judicial article of the Constitution. Of these terms the word "case" is the more comprehensive. The language of Mr. Justice Field in the case of In re Pacific Railway Commission (C. C.) 32 Fed. 241, 255, has been frequently quoted and approved by the Supreme Court, and seems the most accurate statement which has yet been made on the subject:

The judicial article of the Constitution mentions cases and controversies. The term "controversies" if distinguishable at all from "cases" is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm vs. Georgia, 2 Dall. 431, 432 (1 L. ed. 440) 1 Tuck Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form the Judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or **possible adverse parties** whose contentions are submitted to the court for adjudication."

Now, opposing counsel say that there is no ad-

verse party. Why not? The defendant is not the representative of the Attorney General, as opposing counsel seems to think, but a constitutional officer elected in the 19th Judicial District of Kentucky to represent the Comm nwealth in the enforcement of its laws, including the writing of indictments for infractions of its law, and wno has done so against the corporate plaintiff in error for alleged infractions of the statute in question whose enforcement will entail confiscation of its property from multitudinous and oppressive fines practically unappealable to this court. Constitution of Kentucky, section 97.

Moreover, the Kentucky Court of Appeals has specifically held a case identical with this to be "an actual controversy." Jewell Tobacco Warehouse Co. vs. Kemper, 206, Ky. 667.

However, it is submitted that even if it were true that consequential relief could not be afforded in this case, there would still be "an actual controversy" and the lower court would still have jurisdiction. For in the case of Harrison vs. Moncravie, 264 Fed. 781, the United States Circuit Court of Appeals Eighth Circuit said: "The final objection to the jurisdiction of the court below is that its judgment or decree is not conclusive, and that the court below has no power to enforce it, **unless the partition or sale it directs is approved by the Secretary of the Interior.** Kenny vs. Miles, 250 U. S. 58, 39, Sup. Ct. 417, 63 L. Ed. 841, filed May 19, 1919. In support of this contention they cite Hayburn's case, 2 Dall. 408, 411, 412, 1 L. Ed. 436, United States vs. Ferreira, 54 U. S. (13 How.)

39, 49, 50, 14 L. Ed. 42, In re Sanborn, 148 U. S. 222, 226, 13 Sup. Ct. 577, 37 L. Ed. 429, Gordon vs. United States, 117 U. S. 699, La Abra Silver Mining Co. vs. United States, 175, U. S. 423, 457, 20 Sup. Ct. 168, 44 L. Ed. 223. But the effect of the decisions in those cases is that the Supreme Court is without jurisdiction to review the judgments or findings of an inferior federal court in a cause in which the Supreme Court would have no power to enforce its judgments, because the third article of the Constitution, section 1 provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," and the review by the Supreme Court of findings or judgments in cases in which it could not enforce judgments is not the exercise of this judicial power granted to it by the Constitution. **The Supreme Court, however, is the only court whose jurisdiction is thus fixed, and limited by the Constitution.** The **other** courts of the United States, including the court below and this court, are ordained and established and **their jurisdiction is fixed by the acts of Congress,** and, as was said in the leading case (117 U. S. 699) by **Chief Justice Taney, Congress may undoubtedly establish tribunals with special powers subject to the supervision of the head of an executive department.**

In the case in hand Congress has expressly granted the power to hear and adjudge the claims of heirs of deceased incompetent Osage Indians to any court of competent jurisdiction subject to the approval of the Secretary of the Interior. The court below is a court

of competent jurisdiction. If it may not adjudge the claims of such alleged heirs, then no court of competent jurisdiction may, the county court, may not, and the contestants are remediless. It may be and perhaps is true that the Supreme Court is without power to review the judgments or decrees of the tribunals upon which the Congress has conferred the power to adjudicate these claims, but that fact is not conclusive of the jurisdiction of the court below or of this court. **They are legislative courts, while the Supreme Court is a constitutional court.** Nor does the fact that the partitions and sales which the tribunals named in the act of April 18, 1912, adjudge may not be affected until the Secretary of the Interior approves them much disturb our minds. They rest in the abiding conviction that these decrees will commend themselves to his approbation, and the conclusion is that the court below had plenary jurisdiction to hear and adjudge the issues in this case."

The foregoing conclusion seems to be fully supported by the case of United States vs. Jones, 119 U. S. 477, which held that the statute having been amended, an appeal to the Supreme Court of the United States could then be given from a decision of a court of claims allowing a demand against the Government "that necessarily involved a ruling that such a decision may be a judiciary act, notwithstanding the tribunal rendering it, is without power to enforce it, because no money can be drawn from the Federal Treasury, but in consequence of appropriations made by law and for that reason a court cannot enforce a money judgment against the Government."

In view of this, the distinction between the facts in the instant case and those in Muskrat vs. United States, 219 U. S. 345, and kindred cases cited by opposing counsel is clear; and, therefore, they fail to support the contention that "this action does not present a case or controversy for judicial determination."

C

"THE FEDERAL PRACTICE AND CONFORMITY ACT DOES NOT ENABLE FEDERAL COURTS TO RENDER DECLARATORY JUDGMENTS UNDER STATE DECLARATORY JUDGMENT LAWS."

In discussing this proposition opposing counsel say: "At the outset, it should be noted that the Kentucky Declaratory Judgment Law was only intended to apply to the courts of the State of Kentucky_____ the entire context of the Act shows that it is applicable only to the courts of the State of Kentucky and was not intended to and cannot be made to apply directly or indirectly to the United States District Court." Now, while it is true that the entire context of the Act shows that the General Assembly was thereby regulating the practice in the courts of Kentucky and that it was not intended to have any extra territorial effect; yet it is submitted that, nevertheless, it can be made indirectly to apply to the United States District Courts in Kentucky by virtue of the Conformity Practice Act of Congress.

Finally, opposing counsel express their contention with respect to the Kentucky Declaratory Judgment

Law as follows: "No question of practice, pleading or procedure is involved. The question presented is exclusively one of **jurisdiction. On the contrary** the contention of counsel for plaintiffs in error with respect to the Declaratory Judgment Law is that no question of jurisdiction is **thereby** presented. The question presented is exclusively one of practice, pleading and procedure. And, this contention is based upon the following grounds:

In the first place, it will be observed in section 1 of the Act that **no jurisdiction** is thereby **conferred,** but that the prescribed procedure is limited to the courts of Kentucky already **"having general jurisdiction."**

In the second place, this procedure is limited not only to courts of record in Kentucky already having general jurisdiction, but also to such courts when and wherein it is made to appear that "an actual controversy exists."

In the third place, the Kentucky Court of Appeals has decided in the case of Kelly vs. Jackson, 206 Ky. 815, supra, that an actual controversy within the meaning of the Act is "not a mooted question," but an actual controversy involving legal rights.

In the fourth place, the purpose of the Act in section 10 is stated as follows: "This Act is declared to be **remedial;** its purpose is to make courts more servicable to the people by way of settling controversies and affording relief from uncertainties and in security with respect to rights, duties and relations and is to be liberally interpreted and administered."

Manifestly, the right of the United States Court for the Eastern District of Kentucky to **refuse** to **conform** to this procedure as authorized and directed by the Conformity Practice Act of Congress involves a construction thereof which presents a Federal question, but not primarily a question of jurisdiction.

For, in the case of Ex parte McNiel, 80 U. S. 13 Wall 236, it is said: "A state law cannot give jurisdiction to any Federal court, but that is not a question in case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law. The Statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principal may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations as if it had been brought in the proper state tribunal of the same locality." See also in Davis vs. Gray 83 U. S. 16 Wall. 203: "A party by going into a national court does not lose any right or appropriate remedy of which he might avail himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals." Hence, in the choice of their tribunal plaintiffs in error did not lose their right to avail themselves of the Kentucky Declaratory Judgment law to the same

extent that they could have done and that the Jewell Tobacco Warehouse Company and others in similar cases in fact did in the State Court. Consequently, the lower court's refusal to conform to the Act of Congress was error; and, indeed, the erroneous determination of this federal question was itself the assumption of jurisdiction.

For, in the case of General Investment Co. vs. N. Y. Central R. R. Co. decided May 24, 1926, 70 L. Ed_____, it is said:

"By **jurisdiction** we mean **power** to entertain the suit, consider the merits, and render a binding decision therein; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought_____Whether a **plaintiff seeking such relief** has the reqnisite standing is a question going to the **merits,** and **its** determination **is an exercise of jurisdiction.** Illinois C. R. Co. vs. Adams, 180 U. S. 28, 34, 45, L. Ed. 410, 412, 21 Sup. Ct. Rep. 251; Venner vs. Great Northern R. Co. 209 U. S. 24, 34, 52 L. Ed. 666, 669, 28 Sup. Ct. Rep. 328. **If it be resolved against him, the appropriate decree is a dismissal for want of jurisdiction**_____Our conclusion is that the court had **jurisdiction** of **the subject matter and** therefore that the decree of dismissal was put on an **untenable** ground."

III.

"THIS IS AN ACTION AGAINST THE STATE OF KENTUCKY TO WHICH THE JUDICIAL POWER OF THE UNITED STATES DOES NOT EXTEND."

The contention of opposing counsel who repre-

sent the Burley Tobacco Growers Cooperative Association, the author of the Act in question and the real party in interest is that the state must necessarily be made a party under the Declaratory Judgment Law where the interpretation of a statute is requested. But section 9 of the Act which is cited in support of this contention simply provides that in any proceeding which involves the validity of a statute the Attorney General shall be **notified** and shall be **entitled** to be heard. Hence, such a provision is not the equivalent of a requirement that the State of Kentucky itself shall be "made a party to an action in its own courts to interpret its own statute at the suit of a party affected thereby."

However, opposing counsel make the following admission: "It has been frequently held that suits may be maintained against the Attorney General or some other officer of the state to prevent such officers from doing some specific act under color of an unconstitutional state law and that such acts are not suits against the state.

In support of this principle that a suit against its officer is not necessarily a suit against the sovereignty, in the case of Jacob Hoffman Brewing Co. vs. M'Ellicott, 259 F. 329, it is said: "The United States attorney says that he has made no actual threats, but **has only argued for a certain construction** of the act under consideration. Perhaps the situation is somewhat different from that of an unconstitutional act clearly forbidding a certain line of conduct and imposing penalties, for an advocate may properly argue in court for a certain construction of an ambiguous law

without fully intending to adopt his arguments in practice unless a judicial decision is had in his favor. Yet the United States attorney is here making, as is quite proper, no absolute disclaimer of an intention to prosecute, and merely stating that, if the situation should not change, he would not prosecute until some decision is rendered. Moreover, this case is before the court on a bill which alleges that it is the threat of the United States attorney to enforce against.....

"the complainant, its officers, agents and servants, numbering more than 70, the various pains and penalties including fine and imprisonment and various forfeitures of property.....all to the irreparable damage of the stockholders and which said injury and damage would be incapable of measurement and adjustification in an action at law."

"Certainly, **if the prosecutions were instituted, the damages would be irreparable and could not, so far as I am aware, be recovered in any form of legal action. If the complaint is too indefinite as to threats, the complainant may be made, on motion, to particularize the threats he alleges.** As Judge Cardozo said in Municipal Gas Co. vs. Public Service Commission, supra: "Undoubtedly the plaintiff has some remedy at law. The decisive point is that it is not as complete or efficient as the remedy in equity."

"I am satisfied after painstaking investigation, that if the United States attorney persists in a construction of the act which is in fact incorrect, **and would naturally result in penalties and forfeitures,** the bill will lie, and the complainant will, in the absence

of a disclaimer, be entitled to **final** injunctive relief. **It should not be obliged,** under such circumstances, **to take the chance that the United States attorney would always exercise his discretion in not instituting prosecutions for what he believed to be repeated violations of a penal statute.** Waite vs. Macy, 246, U. S. 606, 38, Sup. Ct. 395, 62 L. Ed. 892; Vicksburg Water Works Co. vs. Vicksburg, 185 U. S. 82, 22 Sup Ct. 585, 46 L. Ed. 808.

For the foregoing reasons, I am satisfied, that this suit is **not** against the United States, **and may be entertained against the United States attorney,** because it affects **rights of property** and that the complainant, if his contentions be sound on the merits, has no adequate remedy at law."

In the case of State of Ohio vs. Swift & Co. 270, Fed. 148, the United States Court of Appeals, Sixth Circuit said:

"Citizens may often bring suit on behalf of a state, and the citizen may be and continue the plaintiff of record. The naming of the plaintiff's office may well be that mere description of the person which does not affect plaintiff's identity. In the general common-law suit by A. "for the use and benefit of B." A is the party; B is not. Would Mr. Seney be personally liable for the costs of this action; and, if so, does that indicate that he is plaintiff? In any event, we think it right to say that it is not clear upon the face of the petition that it is a suit by the state of Ohio. It is not necessary to go further in this direction, and we therefore omit any discussion of the common-law practice,

the Ohio Code, and the Ohio decisions as to the real party in such a case_____**The good faith assertion** of **the unconstitutionality of the state law gives jurisdiction to a federal court,** and this jurisdiction continues, both to decide the constitutional question, and to decide all other, even non federal, questions involved, **and even though the court may conclude that the claim of unconstitutionality is unfounded,** or may pass it without decision (Siler vs. Louisville Co. 213 U. S. 175, 191 29 Sup. Ct. 451 53, L. Ed. 753); and, **if this same good faith assertion operates to determine that the state is not a party, it must likewise continue to have that effect, regardless of how it may be decided**_____ Whether the application of the laws of Ohio, proposed by Mr. Seney's complaint, would work a violation of the Fourteenth Amendment, may depend in part upon questions of fact—e. g., whether the proposed sale would bring confiscation; whether the property involved was so impressed with an interstate character as to be beyond the declared policy of Ohio, etc. But if we were to pass this view, and assume that such violation depended wholly upon matters of law arising upon the undisputed facts, and upon the view to be taken of the state laws and the Columbus case, the result would be the same. It might be thought that, since every one is bound to know the law, a claim of unconstitutionality which was based upon mere application of legal principles to the conceded facts, would not support the federal jurisdiction after the claim had been found to be erroneous; **but the cases seem to recognize no distinction between questions of constitutionality dependent on disputed**

facts and those dependent on mere observation of the state laws. See Caldwell vs. Sioux Falls Co., 242 U. S. 559, 564, 37 Sup. Ct. 224, 61 L. Ed. 493 ("Blue Sky" case); Tanner vs. Little 240 U. S. 369, 36 Sup. Ct. 379, 60 L. Ed. 69 ("Trading Stamp" Case.)

In the case of Cavanaugh vs. Looney, 248, U. S. 456, this court said: "It is now settled doctrine "that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." Ex parte Young, 209 U. S. 123, 155, 156; Western U. Teleg. Co. vs. Andrews, 216 U. S. 165-167; Home Teleph. & Teleg. Co. vs. Los Angeles, 227 U. S. 278: Truax vs. Raich, 239, U. S. 33, 37: Greene vs. Louisville & Interurban R. Co. 244 U. S. 499, 506."

So, in the case at bar, the nominal defendant in error, unadmonished, has no other alternative upon the undisputed facts except to enforce this unconstitutional statute, this engine of oppression, at the zealous behest of the real defendant in error even to the complete confiscation of the property and the destruction of the liberty of the plaintiffs in error guaranteed by the Federal Constitution.

IV.

"THE PRESENT ACTION DOES NOT WAR-

RANT THE RENDITION OF A DECLARATORY JUDGMENT UNDER THE TERMS OF THE DECLARATORY JUDGMENT LAW EVEN IF THE FEDERAL COURTS HAD THE DECLARATORY JURISDICTION."

In the light of the case of Jewell Tobacco Warehouse Co. vs. Kemper, 206 Ky, 667, a case exactly like the instant case and one with which opposing counsel were connected, it is difficult to understand why the contention should here be made that a Kentucky Court acting under the Declaratory Judgment Law would have declined to take jurisdiction of this action.

Moreover, an inferior court of record, "having general jurisdiction," could not have refused to take jurisdiction of an action, where an actual controversy exists.

For in the case of Proctor vs. Avondale Heights Co. 200 Ky. 81, cited by opposing counsel where jurisdiction was conceded, it is said: "Under the facts presented here, the court should have exercised the plain discretion thus given, by declining to declare any rights in this action, **except** the right of appellee to make a conveyance to the water company according to the terms of its contract and **should have left all other matters in issue for a final determination in the injunctive suit."**

Besides, the District Court refused jurisdiction although it is a well settled rule of law that the Federal courts are not bound by the decisions of the State

courts with respect to their interpretation of the Federal Constitution and laws and, therefore, a citizen of the United States has an undoubted right to invoke the jurisdiction of the Federal Court, to place its own interpretation upon state laws alleged to be in conflict with the Federal laws and the Constitution.

Opposing counsel at page 70 of their brief further say: "If the decision of the Court of Appeals of Kentucky in the Jewell Case is denied the warehousemen any rights under the Constitution or Laws of the United States, their remedy was to secure a review of such decision in the Jewell case by this Court. However, the several warehousemen represented by able counsel in the Jewell case did not seek such a review by this court and the judgment of the Court of Appeals of Kentucky declaring the Warehouse Law of 1924 valid and defining the rights, and duties of warehousemen thereunder is final, binding and conclusive. The issue is clearly res judicata." But what has that to do with this case? What arrangement or compromise may have been made by the Jewell Tobacco Warehouse Company with the Burley Tobacco Growers Cooperative Marketing Association, a confessed monopoly, an octopus whose tentacles reach out in all directions, is a matter peculiarly within their knowledge and not that of the plaintiffs in error. Plaintiffs in error have no controversy with the Jewell Tobacco Warehouse Company because it selected the state court while they chose rather to submit the grave federal question to the Federal District Court. However, had this case been brought in the State Court it would certainly have taken jurisdiction as it did in similar

cases, and it would have decided the merits of the case upon general demurrer to the petition; and, further, if the arguments upon the Federal question herein presented would not have prevailed, the State Court in rendering its opinion would certainly not have rested its conclusion upon the ground of res judicata, but rather that of stare decisis. However that may be, it is illogical to contend that, because the State court construes the provisions of the Federal Constitution in one case, it is neither necessary nor proper for a citizen of the United States to invoke the Federal Courts to construe the same provisions in a similar case.

In the case of Atchison, Topeka & Santa Fe R. Co. vs. Matthews, 174 U. S. 100, this court has said:

"It may be suggested that this line of argument leads to the conclusion that a statute of one state whose purpose is declared by its Supreme Court to be a matter of police regulation will be upheld by this court as not in conflict with the Federal Constitution, while a statute of another state, precisely similar in its terms, will be adjudged in conflict with that constitution if the Supreme Court of that state interprets its purpose and scope as entirely outside police regulation. But this by no means follows. This court is not concluded by the opinion of the Supreme Court of the state. Yick Wo vs. Hopkins, 118 U. S. 356, 366. It forms its own independent judgment as to the scope and purpose of a statute, while of course leaning to any interpretation which has been placed upon it by the highest court of the State."

Indeed, in the case of Siler vs. Louisville & N. R.

Co. 213 U. S. 191, it is further said: "The federal questions as to the invalidity of the state statute, because, **as alleged,** it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, **even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."** From the foregoing decisions there appear to be no room for the untenable doctrine that determination of federal questions by the state courts, right or wrong, necessarily precludes a subsequent determination of those same questions in a similar case by the Federal Courts.

V

"THE AUTHORITIES CITED BY THE PLAINTIFFS IN ERROR DO NOT SUPPORT THEIR POSITION."

So many new cases have been cited by plaintiffs in error herein, not found in their original brief, that it is hardly to be assumed that the sweeping statement will again be made that none of them supports their position; or, in the light of them, that those heretofore cited do not support their position. In extenuation of this sweeping statement it should be said that it appears to be due to an entire misconception of the contention of plaintiffs in error; which we have striven in vain to present, if it still appears to opposing counsel, to be "that, under the Practice Conformity Act, United States Courts have, by virtue of state laws, the special and enlarged jurisdiction expressly confer-

red upon the courts of the state in which they sit by virtue of state laws." Manifestly, no authoriy is cited and none can be found to support such an imaginary and far reaching proposition. The attention of opposing counsel is therefore invited to the **real** contentions in the case and the authorities cited in support of **them.**

VI.

CONCLUSION

For the foregoing reasons it is earnestly insisted that the judgment appealed from is erroneous and should be reversed.

Respectfully Submitted.

ALLAN D. COLE.

Attorney for Plaintiffs in Error.

J. M. COLLINS, Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. [redacted] 60

THE LIBERTY WAREHOUSE COMPANY AND C. M. JONES, TRADING, ETC.,
Plaintiffs in Error,

vs.

B. S. GRANNIS, AS COMMONWEALTH ATTORNEY FOR THE 19TH JUDICIAL DISTRICT OF KENTUCKY,
Defendant in Error.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

AARON SAPIRO,
Chicago, Ill.,
ROBERT S. MARX,
Chicago, Ill.,
Attorneys for Defendant in Error.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

TABLE OF CASES.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925,

No. 354.

THE LIBERTY WAREHOUSE COMPANY AND C. M. JONES, TRADING, ETC.,
Plaintiffs in Error,

vs.

B. S. GRANNIS, AS COMMONWEALTH ATTORNEY FOR THE 19TH JUDICIAL DISTRICT OF KENTUCKY,
Defendant in Error.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

History of the Case.

This is a proceeding in error to reverse a judgment of the District Court of the United States for the Eastern District of Kentucky dismissing the Petition in said Court for want of jurisdiction. (R. 23.)

The Petition asked for a judgment in the United States District Court, under the Kentucky Declaratory Judgment Law covering an Act of the Kentucky Legislature regulating the sales of leaf tobacco at public auction. (R. 1.)

The Commonwealth's attorney was named Defendant.

He demurred specially to the Petition on the ground that the District Court of the United States did not have jurisdiction. The Court sustained the demurrer without writing an ~~injunction~~ opinion. Upon the failure of the Plaintiffs to amend, the action was dismissed. (R. 23.)

The only question in this case is whether the United States District Court had jurisdiction to entertain this action.

Statement of Facts.

The Petition was filed December 11, 1924, to obtain:

(1) A declaration of rights;

(2) The advice of the United States District Court for the Eastern District of Kentucky; and

(3) A judgment declaring the Act of the Kentucky Legislature unconstitutional.

All this was asked under the claim that the United States District Court had such jurisdiction by reason of the Kentucky Declaratory Judgment Act (Chap. 83, Kentucky Acts of 1922, p. 235).

Two plaintiffs were joined in the Petition, namely, The Liberty Warehouse Company, a *Kentucky* corporation doing business in Kentucky, and C. M. Jones, an individual doing business in Kentucky, but alleged to be a citizen and resident of *North Carolina.* No reason or warrant is stated in the Petition for joining these two plaintiffs. (R. 1.)

The Liberty Warehouse Company states that it is engaged in the business of operating a loose-leaf tobacco warehouse and business in the City of Maysville, Kentucky. C. M. Jones states that he is engaged in a similar business as a trader and dealer at the same place.

The Defendant named in the petition is B. S. Grannis,

Commonwealth's Attorney for the Nineteenth Judicial District of Kentucky. No relief is asked against this Defendant and no order or declaration is asked affecting this Defendant. (R. 6.) The sole reason for making the Commonwealth's Attorney a party defendant is because he is said to be a representative of the State of Kentucky. The Petition recites:

> "Said plaintiffs state that the defendant, B. S. Grannis, is Commonwealth Attorney for the Nineteenth Judicial District of Kentucky, and he is made a party defendant herein as the representative of the Commonwealth who is charged with the duty of the enforcement of said Act of 1924, and who, as Commonwealth's Attorney, prepared the indictments referred to herein. A copy of the petition in accordance with the law, will be served upon the Attorney General of the State of Kentucky, who has the right to be heard in his own name, or through the Commonwealth's Attorney for the Nineteenth Judicial District. The Commonwealth alone is charged with the duty of enforcing said Act of 1924, and, as these plaintiffs are advised, no other person is a necessary party to this suit." (R. 6.)

In the above quotation from the Petition, the Defendant is described as the one "who, as Commonwealth's Attorney, prepared the indictments referred to herein." (R. 6.) However, there is no other reference in the Petition or in the record to the preparation of any indictments, and no claim that an indictment was returned against the Plaintiffs or either of them. The reference to "indictments" just quoted is an evident error.

The facts upon which the Plaintiffs ask for the advice of the Court and for a declaration that the Kentucky Law regulating sales of tobacco at public auction is unconstitutional are somewhat meagerly stated in the Petition. The Plaintiffs say in their Petition that they sell tobacco at public auction on the floor of The Liberty Warehouse Company; that most of this tobacco is grown

in Kentucky but that a part is shipped into Kentucky from adjoining states. The Plaintiffs state that part of the value of their business consists of lists of customers and that the disclosure of the names of their customers, as the Kentucky Act regulating the sales of tobacco at public auction requires, would cause them a serious loss because their customers do not desire to disclose their names publicly. (R. 1.) The Act complained of is referred to as "An Act regulating the sales of leaf tobacco at public auction in this Commonwealth (Chap. 10, The Acts of Kentucky of 1924, pp. 14, 15 and 16, effective Feb. 27, 1924). The provisions of this Act are not set forth in the Petition, but are appended hereto Appendix A. Has

The Plaintiffs then state "that an actual controversy exists with respect thereto, in that they and each of them have been threatened with serious civil and criminal punishments and penalties for the violation of said Act, and which are about to be enforced thereunder; by reason whereof, and for other manifest reasons, it is impossible for them to continue business or to operate their business without serious financial loss, amounting to confiscation of their rights, business and property, *unless a declaration of their rights and duties under said Act of the General Assembly of* 1924 *is made by this court.*" (R. 2.)

There is no statement in the Petition that the Defendant or any particular person has made any threat of (1) civil, or (2) criminal punishment of the Plaintiffs. There is no claim that such threat, if made, has been or is about to be carried out. There is nothing in the Petition to indicate that the Plaintiffs are violating said Act or intend to violate it, or to do anything to warrant any indictment or any interference by the Commonwealth's Attorney. So far as appears from the Petition, there is no actual

controversy with anyone capable of litigation and the Plaintiffs are complying with the law peacefully.

There is a recital in the Petition about the organization of the Burley Tobacco Growers Co-operative Marketing Association, and its entire contract is incorporated in the Petition. (R. 3, R. 8 to 21, inclusive.)

The Petition states that the Burley Tobacco Growers Co-operative Association urged the enactment of the law in issue. (R. 3.) The Petition also sets forth argumentatively the claims of the Plaintiffs that the Act of 1924 regulating the sale of tobacco at public auction is unconstitutional because it is said to violate, *first,* the Constitution of Kentucky, Sec. 59, subsections 4 and 29, and Sections 2 and 3; and *second*, the Constitution of the United States and particularly the Fourteenth Amendment; "The Interstate Commerce Section"; and further, it is said to violate the "Sherman Anti-Trust Law." (R. 3, 4, 5, 6.)

The purpose of the Petition is stated by the Plaintiffs as follows:

> "Said plaintiffs now make this application to this court, both in accordance with the Act of Congress known as the Conformity Statute, and in accordance with the provisions of Chapter 83 of the Acts of 1922 of the General Assembly of Kentucky, known as the Declaratory Judgment Law, for the purpose of securing a declaration of their rights and duties under such Acts of 1924, and for the purpose of having this court determine whether in the conduct of their business, it will be necessary for them to comply with the provisions of said Act of 1923 or whether Chapter 10 of the Act of 1924 is invalid in whole or in part, * * *
>
> "Said plaintiffs state that in the operation of their business, it has been their custom for a number of years to open the warehouse of the corporate plaintiff on or about the first day of December of each year; and that they have now opened their ware-

house for the purpose of selling leaf tobacco at public auction; that in the conduct of their said business and in conducting sales of leaf tobacco at public auction, it is necessary for them to know whether said Act of 1924 is valid or invalid, and whether these plaintiffs are liable for the crimes therein denounced, and subject to the punishments and penalties prescribed in said Act of 1924, and whether under said Act crimes can be innocently committed by them and the penalties therein prescribed imposed upon them, even though diligent efforts are made on their part to comply with the said law." (R. 2.)

The prayer of the Petition is as follows:

"Wherefore plaintiffs pray this court by its judgment to declare what their rights and duties under said Act of 1924 are, and that a judgment be rendered declaring said Act of 1924 invalid, and for all proper relief." (R. 6.)

To this Petition, the Defendant filed a special demurrer, January 12, 1925, on the ground that the Court had no jurisdiction of the subject matter of the action. (R. 22.) He also filed a general demurrer which was not considered in view of the ruling of the Court upon the jurisdictional question.

The demurrer was heard by Judge A. M. J. Cochran on January 12, 1925, and taken under consideration. On February 4th, the Court entered an order sustaining the special demurrer. (R. 23.) The Plaintiffs declined to amend and on February 16, 1925, judgment was entered finding that the Court had no jurisdiction and dismissing this action. (R. 23.) The writ of error is to reverse this judgment.

Prior to the filing of the present case in the United States District Court, similar actions were commenced by the Jewell Tobacco Warehouse Company and other warehouse companies in the courts of Kentucky to secure a declaratory judgment in Kentucky courts under the

Kentucky Declaratory Judgment Law and asking that the Kentucky Act regulating the sale of tobacco at public auction be declared unconstitutional and invalid.

On January 20, 1925, prior to the order sustaining the special demurrer in this case, the Court of Appeals of Kentucky handed down its decision in the case of *The Jewell Tobacco Warehouse Co. et al.* v. *Kemper, Commonwealth's Attorney, et al.* (1925), 206 Ky. 667, 268 S. W. 324. In the Jewell case, the court of last resort of Kentucky rendered a declaratory judgment and construed and interpreted the Act of 1924, Chap. 10, regulating the sale of leaf tobacco at public auction and held that as so construed, the said Act did not violate the Kentucky or Federal Constitution, did not regulate or burden interstate commerce and was in all respects valid.

The Question Presented.

The sole question is whether the judgment of the United States District Court dismissing the petition of the Plaintiffs for want of jurisdiction is correct.

SUMMARY OF ARGUMENT.

I.

The Petition Does Not Show Any Ground for Invoking the Jurisdiction of the United States District Court.

A. *No diversity of citizenship.*

B. *No Federal Question.*

C. *No Jurisdictional Amount Alleged.*

II.

The United States Courts Do Not Have Jurisdiction of an Action to Secure a Mere Declaration of Rights and to Render a Declaratory Judgment Under a State Declaratory Judgment Law.

A. *This action does not present a case or controversy for judicial determination.*

B. *The Federal Practice and Conformity Act does not enable Federal courts to render declaratory judgments under state declaratory judgment laws.*

III.

This Is an Action Against the State of Kentucky, to Which the Judicial Power of the United States Does Not Extend.

IV.

The Present Action Does Not Warrant the Rendition of a Declaratory Judgment Under the Terms of the Kentucky Declaratory Judgment Law, Even If the Federal Courts Had the Requisite Jurisdiction.

ARGUMENT.

I.

The Petition Does Not Show Any Ground for Invoking the Jurisdiction of the United States District Court.

Aside from the complete lack of jurisdiction upon the part of the Federal courts to render declaratory judgments, the Petition sets forth no ground for coming into a United States District Court.

Section 24 of the Judicial Code relevant to this case reads:

> "The District Courts shall have original jurisdiction as follows: First, of all suits of a civil nature at common law or in equity, * * * where the matter in controversy exceeds exclusive of interest and costs, the sum or value of $3,000.00 and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states. * * *"

The present action is not a suit of a civil nature at common law or in equity and (a) is not between citizens of different states; (b) does not arise under the Constitution or laws of the United States; and (c) does not involve the necessary jurisdictional amount.

A. *No diversity of citizenship.*

One of the Plaintiffs, the Liberty Warehouse Company, is admittedly "a corporation created, organized and existing under the laws of the State of Kentucky."

The Defendant is the Commonwealth's Attorney for the Nineteenth Judicial District of Kentucky and a citizen and resident of Kentucky.

Such being the case, the law is concisely stated in *Rogers* v. *Chickamauga Trust Co.* (1918) (C. C. A. 5), 253 Fed. 541. In that case a bill was filed in the District Court by a Tennessee corporation and a citizen of Georgia against a citizen of Georgia. The Court said:

> "One of the plaintiffs being a citizen of the same state of which the defendants are citizens, the suit was not maintainable in the court in which it was brought, unless that court had jurisdiction upon some ground other than diversity of citizenship of the opposing parties."

B. *No Federal question.*

In the Petition of the Plaintiffs requesting a declaration of their rights, it is argued that the Act of the Legislature of Kentucky regulating the sale of leaf tobacco at public auction (Chapter 10, Act of 1924) is unconstitutional, primarily because it violates the Bill of Rights and the Constitution of Kentucky. (R. 3-4.) And secondarily, because it violates the Federal Constitution. (R. 5.)

The claim that a law violates the State Constitution should be dealt with in the first instance by the State courts.

In *City of New Orleans* v. *Benjamin* (1894), 153 U. S. 411, 38 L. ed. 764, the Court said at page 424:

> "Ordinarily the question of the repugnance of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require (*Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636), and if there be ground for complaint of their decision, the remedy is by writ of error under Sec. 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the 25th Section of the Judicial Act of 1789, and has adhered to it in subsequent legislation."

Since printing our brief this court has decided Fenner vs. Boykin (1926) 271 U. S. 240

This case holds that a Federal court will not enjoin the execution of a state statute on constitutional grounds unless it is plain that the law affords no adequate protection. The court said:

"An intolerable condition would arise if, whenever about to be charged with violation of a state law, one were permitted freely to contest its validity by an original proceeding in some Dederal court."

This case was followed in *Defiance Water Co.* v. *City of Defiance* (1903), 191 U. S. 184, 48 L. ed. 140.

In *Shanks et al.* v. *Banting Mfg. Co. et al.* (1926), 9 Fed. (2d) 116, the Court declined to take jurisdiction of a case in which it was claimed that certain acts were contrary to the State and Federal Constitutions:

> "It is sound policy, and one encouraged by the flavor of all Federal adjudications, not to extend Federal jurisdiction over matters equally cognizable by State tribunals unless the elements of that jurisdiction are so clearly present that the principal of comity has no place in the matter."

In *Seattle Electric Co.* v. *Seattle R. & S. R. R. Co.* (1911) (C. C. A. 9), 185 Fed. 365, the Court held that an action to enjoin the enforcement of a law on the ground that it would deprive complainant of its property without due process, is not within the jurisdiction of the Circuit Court in the first instance where the State Constitution contains a similar prohibition, the rule being that in such cases the remedy must be first sought in the State courts.

It is also claimed that the Act complained of violates the Fourteenth Amendment of the Federal Constitution and unreasonably regulates or burdens interstate commerce.

No facts are set forth in the Petition supporting either claim. The text of the Act is not set forth in the Petition; nor does the Petition set forth any particular provision of the Act which it is claimed deprives the Plaintiffs of property, denies them the equal protection of the law or in any way regulates or burdens interstate commerce.

It is not claimed in the Petition that any specific act has been done by anyone or that there is imminent danger or threat of anything being done by anyone which denies the Plaintiffs due process of law, deprives them

of property, or imposes a restriction upon the free flow of commerce between the states.

Although the Act is not set forth in the Petition, it is printed in the brief of Plaintiffs in Error in support of their motion to advance (pp. 4, 5 and 6) and as Appendix "A" of this Brief. This Act has been construed by the Court of Appeals of Kentucky in *Jewell Tobacco Warehouse Co. et al.* v. *Kemper, Commonwealth's Attorney et al.* (1925), 206 Ky. 667, 268 S. W. 324. The court said (page 327):

> "The able and learned trial judge, who so satisfactorily presides over the Fayette circuit court, delivered an opinion at the time of the rendition of the judgment appealed from in which he, in our judgment, correctly construed and interpreted the act of 1924. We can think of no reason why a warehouseman conducting auction sales of loose leaf tobacco may not easily comply with the provisions of the act when properly interpreted. The duties are simple and easily performed. They are but regulatory, and such as come clearly within the police power of the state. The act, when simplified, means that the warehouseman must post not less than 30 minutes prior to the sale of tobacco of any owner or producer, at a point in the office of said warehouse convenient and accessible for public inspection, a typewritten or printed list showing the true name and post office address of the owner and producer, and the number of pounds of tobacco of each person, firm or corporation whose tobacco will that day be offered for sale in said warehouse.
>
> "He must post, not later than 9 a. m., on the day following the sale, a notice in a conspicuous place upon his premises, stating the number of pounds of tobacco in the aggregate actually sold, and the average price per pound received on account of each day's sale.
>
> "Every person delivering tobacco to a warehouse for sale at public auction must give to the warehouseman the true name and post office address of the producer and owner of the tobacco, and, unless such names and post office addresses are given, the

warehouseman shall not receive the tobacco. If the warehouseman fails to post the notices which are required to be posted at 9 in the morning after the day of sale, then he is subject to a fine. If the warehouseman or person selling the tobacco falsifies the actual number of pounds sold, or the average price thereof, or who shall falsely list a name, post office address, or number of pounds of tobacco of the producer or owner whose tobacco that day shall be offered for sale, he is liable to a fine.

"If any person shall furnish a false name or address of the owner or producer of the tobacco to the warehouseman, he shall be subject to a fine.

"A warehouseman who posts the name and address of the producer and owner of the tobacco, which name and address is furnished by the person delivering the tobacco, complies with the act, and he is not subject to punishment in accordance with the provisions thereof, even though the information given be false, unless the warehouseman actually knows that the name and address so furnished are false and untrue. He has a right to rely upon the truth of the representations made by the person delivering the tobacco to the warehouse. If the deliverer of the tobacco gives a fictitious or false name of the owner or producer, he calls down upon his head the penalties prescribed by the act.

"So construed, the act is not subject to any of the objections urged by appellants.

"Finding no error to the prejudice of the substantial rights of appellant, the judgment declaring the act constitutional is affirmed."

Interstate Commerce Not Involved.

No question of commerce between the states is involved in this case. The only reference in the Petition to interstate commerce is the following:

> "Plaintiffs state that the larger part of said tobacco so sold is grown in Kentucky, and that a part of same is shipped into Kentucky from the adjoining states and other states, and to such extent these plaintiffs are engaged in interstate commerce." (R. 1.)

There is no statement in the Petition that the Plaintiffs are shippers of tobacco. There is no claim that the tobacco remains in an original package when sold. There is no claim that the law imposes any obligation upon interstate shippers. On the contrary, the face of the Petition shows that the law only regulates the conduct of public auctions of leaf tobacco in Kentucky after the tobacco has been delivered for sale in the state.

The right of the state to regulate public warehouses and the conduct of public auctions therein has been so clearly recognized in every state since Colonial days that it seems unnecessary to cite authority holding that such regulation is in no sense an interference with interstate commerce contrary to the Federal Constitution.

The general rule is stated under the title, "Commerce," in 5 R. C. L., Article 87, p. 766, as follows:

> "A state may prohibit, regulate, or tax the business of selling goods within the state, when the dealings are neither accompanied nor followed by any transfer of goods, or any order for their transfer from one state to another, but the regulation or tax is on the business of selling goods that are not in the hands of the importer or that are still in his hands but not in the original package. This rule applies to merchants, partners or auctioneers and so long as the regulation or tax is uniform on all sales by vendors of the particular class, whether they are citizens of the state or of some other state, and whether the goods sold are the produce of that state or another state, it can not be considered as an attempt to fetter commerce among the states."

As early as *Woodruff* v. *Parhan* (1869), 8 Wall. 123, 19 L. ed. 382, it was held that an ordinance authorizing the collection of a tax on sales at auction, was valid as applicable to goods which are products of other states, even if sold in original packages. In that case the City of Mobile imposed a tax on auction sales and sales of merchan-

dise within the city. The plaintiff sold as an auctioneer and commission merchant goods brought into the state of Alabama from other states in the original and unbroken package. He claimed that he was not liable to the tax imposed upon all sales of merchandise. However, the court held:

> "The case before us is a simple tax on sales of merchandise imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama."

Woodruff v. *Parham, supra,* has been repeatedly followed in:

Wagner v. *Covington* (1919), 251 U. S. 95, at 102.

Texas Co. v. *Brown* (1922), 258 U. S. 466, at 476; 66 L. ed 721, at 726.

Bacon v. *Illinois* (1913), 227 U. S. 504, at 513, 516, 517; 57 L. ed. 619, 620.

Brown-Forman Co. v. *Kentucky* (1910), 217 U. S. 563, at 575; 54 L. ed. 883, at 888.

American Steel, etc. Co. v. *Speed* (1904), 192 U. S. 500, at 521; 48 L. ed. 538, at 547.

Austin v. *Tennessee* (1900), 179 U. S. 343, at 351.

Howe Machine Co. v. *Gage* (1879), 100 U. S. 677.

Emert v. *Missouri* (1895), 156 U. S. 296, at 314, 316; 39 L. ed 430, at 435, 436.

Brown v. *Houston* (1885), 114 U. S. 628, 630, 634; 29 L. ed. 259.

Pittsburgh, etc. Coal Co. v. *Louisiana* (1895), 156 U. S. 600; 39 L. ed. 544.

In *Wagner* v. *Covington* (1919), 251 U. S. 95, 64 L. ed.

157, the Court upheld an ordinance of the City of Covington imposing a license fee upon a non-resident manufacturer of "soft drinks" doing business in Kentucky, which consisted largely in carrying a supply of such drinks from one retailer's place of business to another upon the vehicle in which the goods were brought across the state line and delivering the goods sold in the original unbroken cases. In so doing, the Court said, at page 102:

> "We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state,—a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the 'commerce clause.' *Woodruff* v. *Parhan*, 8 Wall. 123, 140, 19 L. ed. 382, 387; *Howe Mach. Co.* v. *Gage*, 100 U. S. 676, 25 L. ed. 754; *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Baccus* v. *Louisiana*, 232 U. S. 334, 58 L. ed. 627, 34 Sup. Ct. Rep. 439."

In *Texas Co.* v. *Brown* (1922), 258 U. S. 466, 66 L. ed. 721, the Court, in upholding inspection charges of the State of Texas upon petroleum products brought into the state which had reached their destination and were held in storage awaiting local sales, held as follows at page 475:

> "But *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 520, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365, settles the principle that goods brought into a state, not from a foreign country, but from another state, having reached their destination, and being held in storage awaiting sale and distribution, enjoying the protection which the laws of the state afford, may,

without violation of the commerce clause, be subjected to non-discriminatory state taxation, even though still contained in original packages."

In *American Steel & Wire Co.* v. *Speed* (1904), 192 U. S. 500, 48 L. ed. 538, it was held that goods shipped from outside the state to a warehouse where they were stored and then delivered to customers, were no longer in interstate commerce but had reached their destination and were subject to state regulation and taxation.

In *Bacon* v. *Illinois* (1913), 227 U. S. 504, 57 L. ed. 615, Mr. Justice Hughes said, with respect to grain shipped into Chicago and held there for storage:

"But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination."

In *Hopkins* v. *United States* (1898), 171 U. S. 578, 43 L. ed. 290, it was held that the business of buying and selling live stock at stockyards in a city by commission merchants and members of a stock exchange is not interstate commerce, although most of the purchases and sales were of live stock sent from other states. The court said that the selling of an article at its destination, which was sent from another state, does not make the services of the individual employed at the place where the article is sold "so connected with the subject sold as to make them a portion of interstate commerce." (p. 590.) The Court refers to the activities of the produce and cotton exchanges in selling goods from other states, and in holding that they are not engaged in interstate commerce, said, at page 598:

> "We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from states different from the one in which the exchange is situated and the sale made."

In *High Grade Provision Co.* v. *Sherman* (1925), 266 U. S. 497, 69 L. ed. 402, legislation of the state of New York making it a crime to sell kosher food products without having the same properly labeled was assailed as an unconstitutional interference with the interstate business of a Massachusetts corporation conducting a general provision business including the shipment and sale of original packages into the state of New York. Justice Sutherland briefly disposed of this claim as follows, page 503:

> "It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable rela-

tion to the legitimate purpose of the enactments, and do not conflict with any Congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce. *Sligh* v. *Kirkwood*, 237 U. S. 52, 59 L. ed. 835; *Savage* v. *Jones*, 225 U. S. 501, 56 L. ed. 1182."

In *Merchants Exchange* v. *Missouri* (1919), 248 U. S. 365, 63 L. ed. 300, it was claimed that a Missouri law providing that hay and grain stored in warehouses must be weighed by public weighers burdened interstate commerce because the grain was received from and shipped to points without the state. However, the court said:

"Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the state, burdens interstate commerce. It clearly does not. *Pittsburg & S. Coal Co.* v. *Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423."

In *Susquehanna Coal Co.* v. *South Amboy* (1913), 228 U. S. 665, 57 L. ed. 1015, coal was shipped from Pennsylvania to New Jersey, where it was held in a coal depot or storage yard until transported to other states. In upholding local taxation of such coal, Justice McKenna said, at page 669:

"The coal, therefore, was not in actual movement through the state; it was at rest in the state, and was to be handled and distributed from there. Therefore the principles expressed in *General Oil Co.* v. *Crain*, 209 U. S. 211, and *Bacon* v. *Ill.* 227 U. S. 504, are applicable to it. The products in neither of those cases were destined for sale in the states where stored; the delay there was to be temporary,—a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the state. In both cases it was held that there was a ces-

sation of interstate commerce and subjection to the dominion of the state."

Other cases holding that the business of plaintiffs, as warehousemen or auctioneers engaged in selling tobacco within the State of Kentucky, even though some of the tobacco is shipped to their warehouse from other states for public sale within Kentucky, is not interstate commerce, are:

Blumenstock Bros. Advertising Agency v. *Curtis Publishing Co.* (1920), 252 U. S. 436.

Ficklen v. *Shelby County Taxing District* (1891), 145 U. S. 1.

Ware & Leland v. *Mobile County* (1908), 209 U. S. 405, 52 L. ed. 855.

Crescent Cotton Oil Co. v. *Miss.* (1921), 257 U. S. 129.

Williams v. *Fears* (1900), 179 U. S. 270, 45 L. ed. 186.

Singer Sewing Machine Co. v. *Brickell* (1914), 233 U. S. 304, 58 L. ed. 974.

There is not the slightest semblance for any claim that the Act complained of by the Plaintiffs burdens, regulates, or in any way affects interstate commerce.

It is clearly stated to be "An Act regulating the sale of leaf tobacco at public auction in this Commonwealth."

There is no discrimination of any kind. The First Section of the Act provides "That it shall be the duty of *any* tobacco warehouseman, corporation, firm or individual, who shall receive or who shall undertake to receive or take care of leaf tobacco for sale at public auction, whether with or without compensation or reward," to do certain things.

The Act operates uniformly upon all persons within

the well-recognized classifications of tobacco warehousemen or auctioneers.

The penalties provided by Sections 3 and 4 affect only those within the above classification.

Under these circumstances the attempt to come into the United States Court upon a claim that the Commerce Section of the Constitution or the laws of the United States regulating commerce are involved, is without the slightest merit and no facts are alleged to justify any such claim. The case falls within the rule established in *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.* (1920), 252 U. S. 436, in which the court upheld a dismissal of the case by the district court for want of jurisdiction, although a lengthy declaration endeavored to bring the case within the protection of the Sherman Anti-Trust Law with respect to combinations in restraint of interstate commerce. The Court said, at page 441:

> "In any case alleged to come within the Federal jurisdiction it is not enough to allege that questions of a Federal character arise in the case; it must plainly appear that the averments attempting to bring the case within Federal jurisdiction are real and substantial. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 562, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553.
>
> "In cases where, as here, the controversy concerns a subject-matter limited by a Federal law, for which recovery can be had only in the Federal courts, the jurisdiction attaches only when the suit presents a substantial claim under an Act of Congress."

The court then refers to a number of the cases, some of which are cited above, defining interstate commerce and concludes, at page 444:

> "Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in jour-

nals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto can not lay the ground-work for such contentions as are undertaken to be here maintained under Sec. 7 of the Sherman Anti-Trust Act. The Court was right in dismissing the suit. Affirmed."

Fourteenth Amendment Not Involved.

The petition alleges that the Act complained of violates the provisions of the Fourteenth Amendment to the Federal Constitution, in that it (1) deprives the Plaintiffs of the equal protection of the laws; and (2) deprives them of their property without due process of law. There is the additional claim that the Act violates the commerce section of the Constitution of the United States, which we have discussed above, and that it violates the Sherman Anti-Trust Act. There is also a claim that the Act is an attempt to abridge the Plaintiff's privileges and immunities as citizens of the United States.

Merely claiming that certain legislation violates every clause in the Constitution sets forth no ground for Federal jurisdiction. For instance, the Petition says the Plaintiffs further state "that said Act of 1924 denies to them the equal protection of the law, in that, the conducting of their business is made a crime, and they are subjected to severe penalties, even though diligent efforts are made to comply with the law." (R. 5.)

Of course there is nothing to warrant the above and similar statements in the Petition. No facts are set forth to indicate that any penalty of any kind has been imposed upon the Plaintiffs or either of them. Obviously if they comply with the simple provisions of the law they will not be liable to any penalties.

Nor is the business of the Plaintiffs made a crime or

subjected to any undue burdens. There is no allegation of interference of any kind with such business which the Plaintiffs are presumably proceeding to conduct in accordance with law.

The Plaintiffs set forth in their Petition no provision of the law, but merely refer to its title. They do not point out in their Petition any provision of law or any fact in connection therewith indicating that any of their property has been taken or that they have been denied any process of law or any equal right under the Constitution. They do not indicate directly or indirectly, other than by mere general assertion, what privilege or immunity they claim has been denied to them.

The Act itself is clear and simple. It provides that all tobacco warehousemen who receive leaf tobacco for sale at public auction shall *first*, not less than thirty minutes prior to any such sale, post at a point convenient and accessible for public inspection, a typewritten or printed list "showing the true name and post office address of the owner and producer and the number of pounds of tobacco of each person, firm or corporation whose tobacco will that day be offered for sale in said warehouse"; *second*, not later than nine o'clock in the morning on the day following such sale, post a notice in a conspicuous place upon the premises, "stating the number of pounds in the aggregate actually sold, and the average price per pound received on account of each day's sale"; *third*, make due inquiry for the purpose of ascertaining the true name and post office address of the producer and owner of any tobacco received by them.

The penalty provisions of the Act are contained in Sections 3 and 4. Section 3 provides that any warehouseman who fails to post the required notices shall be subject to a fine of not less than Fifty dollars nor more

than One hundred dollars for each day that he fails or refuses to comply with the Act. Section 4 provides that any warehouseman who shall, in the notices posted by him, falsify the actual number of pounds sold or the average price thereof or shall falsely list the name, post office address or number of pounds of tobacco of any producer or owner whose tobacco is to be offered for sale or furnish a false name or address of the owner or producer to any warehouse shall be subject to indictment and upon conviction shall be fined Five hundred dollars for each offense.

Section 5 indicates that the object of the Act is to prevent unnecessary litigation, confusion and fraud growing out of the delivery and sale of tobacco in the State of Kentucky.

A mere reading of the provisions of the Act, which are omitted from the Petition of the Plaintiffs, will be sufficient to convince the Court that the assertions contained in the Petition that the law violates the Fourteenth Amendment and other provisions of the Federal Constitution are utterly groundless.

The right of the several states of the Union to regulate warehouses and public auctions has been firmly established ever since *Munn* v. *Illinois* (1877) 94 U. S. 113, 24 L. ed. 77, 757. *Munn* v. *Illinois* has been repeatedly followed, notably in *Budd* v. *New York* (1892) 143 U. S. 517 at 547, 36 L. ed. 247 at 256; and *Brass* v. *State of North Dakota* (1894) 153 U. S. 391, 38 L. ed. 757 and the great list of cases collected in *Rose's Notes to Munn* v. *Illinois,* Revised Edition V. 9 and Supplement Vol. 2. Indeed the right to regulate tobacco warehouses in Kentucky was settled "long before the rule established in the case of *Munn* v. *Illinois.*" *Nash* v. *Page* (1882) 80 Ky. 539 at 547.

The statutes of Kentucky disclose that as long ago as 1798 it was enacted that the rent charged in tobacco warehouses should be "three shillings for every hogshead of tobacco that shall be received, inspected and delivered." Littel & Swigart Digest of Laws of Kentucky, See also *Louisville Tobacco Warehouse Co.* v. *Commonwealth* (1898) 48 S. W. 420 at 425 S. C. on rehearing, 106 Ky. 165 at 173, 57 L. R. A. 33, 49 S. W. 1069 at 1071.

In *Gundling* v. *Chicago* (1900) 177 U. S. 183, 44 L. ed. 725, the Court upheld an ordinance regulating the sale of cigarettes and in so doing said, at page 188:

> "Regulations respecting the pursuit of a lawful trade or business are a very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are utterly unreasonable and extravagant in their nature and purpose, that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

It is not our purpose to discuss the merits of the legislation questioned by the Plaintiffs, but to call attention to the long line of established decisions with respect to the right of the state to regulate warehouses and public auctions as indicating how utterly devoid of merit the so-called constitutional questions are in this case.

Under such circumstances the mere statement that a constitutional question exists is insufficient to give the court jurisdiction.

In *Newburyport Water Co.* v. *City of Newburyport* (1904) 193 U. S. 561, 48 L. ed. 795, it was claimed that

the property of a water company was taken without due process of law by an Act of the State of Massachusetts. The Court held that there was no jurisdiction because the constitutional claims were unsubstantial; and in so doing, said at page 576,

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions there was of course, jurisdiction. But that is not the sole criterion. On the contrary it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit."

Citing:

Underground R. Co. v. *New York* (1904) 193 U. S. 416, 48 L. ed. 733.

Arbuckle v. *Blackburn* (1903) 191 U. S. 405, 48 L. ed. 239.

Owensboro v. *Owensboro Water Works Co.* (1903) 191 U. S. 358, 48 L. ed. 217.

Defiance Water Co. v. *Defiance* (1903) 191 U. S. 184, 48 L. ed. 140.

Swafford v. *Templeton* (1902) 185 U. S. 487, 46 L. ed. 1005.

McCain v. *Des Moines* (1899) 174 U. S. 168, 181, 43 L. ed. 936, at 941.

In *Defiance Water Co.* v. *City of Defiance* (1903) 191 U. S. 184, 48 L. ed. 140, the Court said that since diverse citizenship did not exist, unless the case was one arising under the Constitution or laws of the United States, the jurisdiction of the circuit court was not properly invoked and added:

> "And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does

really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

Citing:

Western Union Telegraph Co. v. *Ann Arbor R. Co.* (1900) 178 U. S. 239, 44 L. ed. 1052.

Little York Gold Washing and Water Co. v. *Keyes* (1877) 96 U. S. 199, 24 L. ed. 656.

Blackburn v. *Portland Gold Mining Co.* (1900) 175 U. S. 571, 44 L. ed. 276.

Shreveport v. *Cole* (1899) 129 U. S. 36, 32 L. ed. 589.

New Orleans v. *Benjamin* (1894) 153 U. S. 411, 38 L. ed. 764.

In *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.* (1920) 252 U. S. 436, 64 L. ed. 649, the Court, in refusing to take jurisdiction of the case on the ground that although constitutional questions were alleged, they were not substantial, said, at page 441:

"In any case alleged to come within the Federal jurisdiction it is not enough to allege that questions of a Federal character arise in the case, it must plainly appear that the averments attempting to bring the case within Federal jurisdiction are real and substantial."

In *Cuyahoga River Power Co.* v. *Northern Ohio Traction & Light Co.* (1920) 64 L. ed. 626, 252 U. S. 389, it was vigorously alleged that the plaintiff was being deprived of its property without compensation and without due process of law and also that its contract obligations were being impaired. However, the Court said that the rights of the plaintiff cannot be asserted in a Federal court unless a Federal question is involved, adding:

"and a Federal question not in mere form but in substance, and not in mere assertion but in essence and effect." After examining the contentions of the Plaintiff, the Court said:

> "From every Federal constitutional standpoint, therefore, the contentions of Plaintiff are so obviously without merit as to be colorless • • • and, diversity of citizenship not existing, the District Court of the United States had no jurisdiction."

See also *Louisville & Nashville R. R. Co.* v. *Motley* (1908) 211 U. S. 149, 53 L. ed. 126.

In the case at bar there is no diversity of citizenship since the Liberty Warehouse Co., Plaintiff, and the Commonwealth's Attorney, Defendant, are both citizens of Kentucky. There is no substantial or real Federal question in this case, and the District Court is clearly without jurisdiction.

C. *No Jurisdictional Amount Alleged.*

Even if a Federal question were involved, the District Court would be without jurisdiction in the present case because the amount in controversy does not exceed Three thousand dollars, exclusive of interest and costs.

Section 24 of the Judicial Code provides that the District Court shall have jurisdiction "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three thousand dollars and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

In the present case there is no controversy, as we shall point out at greater length under the next heading. In this case, no fine or penalty has been imposed. There is

no statement in the Petition that the Plaintiffs have been put to any particular expense. There is no dispute between the Plaintiffs and the Defendant concerning any particular matter. This is simply an action by the Plaintiffs to secure a declaration of their rights and the advice of the Court as to their duties under a particular Act of the Legislature of Kentucky, coupled with the claim that such Act is invalid.

Nowhere in the Petition is there any averment that the matter in controversy exceeds the sum or value of Three thousand dollars. There is no allegation either in words or in effect that the sum or value of the Plaintiffs rights or property affected by the Act which the court is asked to construe are worth the sum or value of Three thousand dollars.

The only reference to any definite figures contained in the entire petition is the allegation "that the corporate plaintiff is capitalized at Twenty thousand dollars and has a large investment in the warehouse operated by it." (R. 1.) The Petition does not state how much, if any, of this capitalization has been paid in or whether the actual investment is more or less than Three thousand dollars. The Plaintiffs state that their business is valuable and that "It is impossible for them to continue business or to operate their business, without serious financial loss, amounting to confiscation of their rights, business and property, unless a declaration of their rights and duties under said Act of the General Assembly of 1924 is made by this Court." However, the Plaintiffs do not allege what this serious financial loss would amount to and it would be pure speculation, unwarranted by any facts or averments, to imagine that this loss from the simple requirement of posting the true names of persons whose tobacco is sold and the amount of tobacco

sold, would amount to anything like Three thousand dollars.

In *Vance* v. *Vandercock Co.* (1898) 170 U. S. 468, 42 L. ed. 1111, the Court in denying jurisdiction, said:

> "In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum."

In *United States* v. *Seyward* (1895) 160 U. S. 493, at page 497, the Court said:

> "It is clear that a circuit (now District) court, can not under that Statute take original cognizance of a case arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or of a controversy between citizens of different states, or of a controversy between citizens of a state and foreign states, citizens, or subjects, unless the sum in dispute, exclusive of interest and costs, exceeds Two thousand dollars (now Three thousand dollars) because in immediate connection with the enumeration of each of such cases will be found expressed a limitation of that character in respect of the sum or value necessary to give jurisdiction."

And to the same effect are:

> *Holt* v. *Indiana Mfg. Co.* (1900) 176 U. S. 68 at 73, 44 L. ed. 375 at 377.
>
> *Delaware L. & W. R. Co.* v. *Lyne* (1912) (C. C. A. 3) 193 Fed. Rep. 984.
>
> *Bachus* v. *Hartwell* (1901) 112 Fed. 564.

The Plaintiffs intimate that the present action can be maintained under Paragraph 14 of Section 24 of the Judicial Code. That section relates to civil rights and only to actions brought to redress the deprivation "of

any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The plaintiffs do not claim that any right, privilege or immunity granted them by the Federal Constitution or Federal laws is involved. Clearly no civil rights are affected by this case. As pointed out by Judge Hand in *Marcus Brown Holding Co.* v. *Pollak* (1920) 272 Fed. 137 (before Mack and Manton, Circuit Judges and Learned Hand, District Judge), the general right of property is not a right, privilege, or immunity originating in the Constitution or the Fourteenth Amendment thereof. After reviewing the cases, the Judge said, at page 141:

> "Were it not so, all matters arising 'under the Constitution' as prescribed in Subdivision 1, would be justiciable under Subdivision 14, and the amount in controversy would never be a condition upon our jurisdiction, when a Constitutional point was raised. This is certainly not the law."

Our position is that, regardless of the right of the District Court to render the kind of a judgment prayed for, the Plaintiffs did not properly invoke the jurisdiction of the Court to render any judgment at law or in equity because *first,* there is no diversity of citizenship; *second,* there are no real or substantial Federal questions directly involving the Constitution or laws of the United States; and *third,* even if Federal questions were involved there is no averment or showing of any "matter in controversy"; or that, if any, the sum or value thereof exceeds Three thousand dollars, exclusive of interest and costs.

For these reasons the Plaintiffs were not properly in

the U. S. District Court no matter what character of judgment was prayed for.

II.

The United States Courts Do Not Have Jurisdiction of an Action to Secure a Mere Declaration of Rights and to Render a Declaratory Judgment Under a State Declaratory Judgment Law.

The present action is without parallel or precedent. It is purely an action to secure a declaration of rights and the advice of the court with respect to the validity and constitutionality of a state law and of the duties of the Plaintiffs under said law. The Plaintiffs so state in their Petition as follows:

> "Said plaintiffs now make this application to this court, both in accordance with the Act of Congress known as the Conformity Statute, and in accordance with the provisions of Chapter 83 of the Acts of 1922 of the General Assembly of Kentucky, known as the Declaratory Judgment Law, for the purpose of securing a declaration of their rights and duties under such Acts of 1924, and for the purpose of having this court determine whether in the conduct of their busines, it will be necessary for them to comply with the provisions of said Act of 1923, or whether Chapter 10 of the Act of 1924 is invalid in whole or in part, and if so, in what part." (R. 2.)

No relief of any kind is asked in this action. No injunction against action taken or threatened by anyone is prayed for in the Petition. The only prayer of the Petition is in the following words:

> "Wherefore, plaintiffs pray this court by its judgment to declare what their rights and duties under said Act of 1924 are, and that a judgment be rendered declaring said Act of 1924 invalid, and for all proper relief." (R. 6.)

No Federal Declaratory Judgment Law.

The United States courts are at present without jurisdiction of an action to secure a mere declaration of rights and cannot acquire such jurisdiction under a state law providing for the rendition of so-called declaratory judgments.

It is not our purpose to argue the merits or constitutionality of the state Declaratory Judgment Laws. This question is fully and ably discussed in the *annotation to Anway* v. *Grand Rapids Railway Co.* (1920) 211 Mich. 592, 179 N. W. 350, 12 A. L. R. Ann. 26 holding the Michigan Declaratory Judgment Law unconstitutional and in the *annotation to State of Kansas ex Rel.* v. *Grove* (1921) 109 Kans. 619, 201 P. 82, 19 A. L. R. Ann. 1116 holding the Kansas Declaratory Judgment Law constitutional.

Nor is it our purpose to argue the merits or the constitutionality of the proposed legislation to confer power to render declaratory judgments upon the United States courts by Act of Congress. Such legislation was proposed by the American Bar Association five years ago and several bills for this purpose have been introduced into the Senate and the House of Representatives. See *Reports of American Bar Association* 1920 pp. 59, 261, 267; 1921 pp. 55, 387, 395; 1922 pp. 61, 357, 719; 1923 pp. 67, 339; 1924, pp. 71, 341; 1925, p. 408. As lawyers interested in advancing the administration of justice, we are in accord with the recommendations of the American Bar Association and hope that the proposed legislation may ultimately receive the approval of Congress. The constitutionality of the proposed legislation cannot become before the Court until it is first enacted into law.

The important fact in so far as this case is concerned is that up to the present time Congress has refused to enact the necessary legislation to confer jurisdiction

upon the United States District Courts to render declaratory judgments and the proposed bills for this purpose have not been favorably acted upon in either the Senate or the House. However, the effort to secure this legislation is convincing evidence of the generally recognised fact that the Federal Courts have been since the institution of this Government, and are at present without the power to make a declaration of rights such as is prayed for in the present case.

In the report of the able Committee on Jurisprudence and Law Reform of the *American Bar Association for* 1925 (*Henry W. Taft, Chairman*) *Vol.* 50, page 408, the Committee refers to the hearings on Senate Bill No. 3675 authorizing declaratory judgments in the Federal Courts and says:

> "Some doubt was expressed as to the necessity of the measure, it being suggested that the remedies sought by the bill could be obtained under the present procedure, *a view which a careful examination of the proposed remedy would show to be without foundation.* The Committee has continued its efforts to procure the passage of this bill by submitting a brief and through correspondence but it appears to have made no progress and has remained in the two judiciary committees unacted upon."

The United States District Court for the Southern District of New York, although in sympathy with the purpose of declaratory judgments, has held that there is at present no power or jurisdiction to make such declarations. In *Pennsylvania Cement Co.* v. *Bradly Contracting Co.* (1920) 274 Fed. 1003, Judge Hough said at page 1007,

> "Consideration has been given to the cases cited by the creditors. In every one of them there is one thing present which is here absent, viz., a party legally to be required instantly to present his rights for adjudication; but in this instance what is really asked for is what in England (and I believe in New

> Jersey and in other states) is called a 'declaratory judgment'. This means, as I take it, that one having no present demand presently enforceable, but who can be shown to be able to present a demand, as upon the extinction of a life interest or the like, can be compelled to come into court and have his future rights adjudicated. Experience has shown that this is a good thing, *but it is not law in the courts of the United States* nor those of New York, and very regretfully I am compelled to the opinion that this court is without present power to pass on the rights of the United States as to any sum or sums of money received by these receivers in the year 1920 and asserted to be income by the taxing authorities of the United States." (Italics ours).

The absence of any Federal legislation authorizing declaratory judgments has recently been commented on judicially by the Court of Appeals of Virginia in *Pattersons Executors* v. *Patterson, Va.* 131 S. E. 217 (Advance Sheet Feb. 27, 1926), in which the Court says at page 219,

> "In England, the declaratory judgment statute was first enacted in 1850. It was last amended in 1883, and subsequently incorporated in the laws of Australia and Canada. Statutes authorizing the entry of declaratory judgments and decrees have been passed by the Legislatures of California, Connecticut, Florida, Hawaii, Kansas, Kentucky, Michigan, New Jersey, New York, Rhode Island, Virgina, and Wisconsin. *There is as yet no federal statute authorizing such judgments and decrees.* Freeman on Judgments (5th Ed.) Sec. 1354."

It is worthy of note that even under the proposed Federal legislation which Congress has so far refused to enact, it is provided that declaratory judgments may be rendered in the Federal courts only "*in cases of actual controversy* in which, *if suits were brought, the courts of the United States would have jurisdiction.*" *Report of the Judiciary Committee of the House of Representatives,* No. 1441 (68th Congress, Second Session) to

accompany H. R. 5194. So that even under the proposed legislation (which failed of passage) there would have been no jurisdiction of the present case because there is *first*, no actual controversy; and *second*, it is not a case in which the courts of the United States have present jurisdiction.

The Plaintiffs concede that there is no Federal Law authorizing a judgment such as they ask, but bring this action under the Kentucky Declaratory Judgment Act in the Federal District Court and claim that in conformity with state practice the Federal court should render such judgment. We discuss later the absurdity of the claim that the Federal courts derive jurisdiction from an Act of the Kentucky Legislature. At this point, we state that we are making no argument against the merits or the constitutionality of the Kentucky Act or the proposed Federal acts. The consistency and good faith of our position in this respect is evidenced by the fact that when the *Jewell Tobacco Warehouse Co.* and others brought proper actions in the *Courts of Kentucky* under the Kentucky Declaratory Judgment Law to construe the Kentucky Act of 1924 regulating warehouses, selling tobacco at public auction, as counsel for the Defendant in that case, we made no objection to the procedure or to the right of the Kentucky Court to render a declaratory judgment pursuant to the laws of that State. *Jewell Tobacco Warehouse Co.* v. *Kemper, Commonwealth's Attorney et al* (1925) 206 Ky. 667, 268 S. W. 324.

But Federal courts have no jurisdiction to make a declaration of rights and render an advisory opinion as asked by Plaintiffs in this case. The Federal courts are limited in their jurisdiction by the Constitution and by the laws enacted by Congress thereunder.

Article 3, Section 1 of the Constitution of the United States provides that the judicial power "shall extend to all cases, in law and equity," arising under the Constitution * * * and "to controversies" between citizens of different states * * *. Section 24 of the Judicial Code provides that the District Court shall have jurisdiction "of all suits of a civil nature, at common law or in equity," as thereafter set forth.

In the case of *The Sewing Machine Companies,* 85 U. S. (18 Wall.) 553, 21 L. ed. 914, Mr. Justice Clifford said at page 577:

> "Circuit courts do not derive their judicial power immediately from the Constitution as appears with sufficient explicitness from the Constitution itself * * * consequently the jurisdiction of the Circuit Court in every case must depend upon some Act of Congress, as it is clear that Congress inasmuch as it possesses the power to ordain and establish all courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversy between party and party but such as the statute confers."

The above applies with equal cogency to District Courts to which, by the enactment of the Judicial Code, Congress has transferred the jurisdiction of the Circuit Courts. *Sections* 289, 290, 291 *Hopkins New Annotated Federal Judicial Code, Page* 7.

A. This Action Does Not Present a Case or Controversy for Judicial Determination.

The action brought by the Plaintiffs does not present a case or controversy or a suit of a civil nature at common law or in equity within the meaning of the Constitution or the statutes conferring jurisdiction upon District Courts of the United States.

It is essential to a case in controversy that there be adverse parties and that there be some matter in dis-

pute between them capable of judicial determination. These conditions do not exist in the present action. There is no adverse party. The Defendant is expressly made a Defendant, not because he is doing anything adverse to the rights of the Plaintiff but "as the representative of the Commonwealth who is charged with the duty of the enforcement of said Act of 1924". (R. 6.) (There is also a statement that the Defendant prepared "the indictments referred to herein," but no such indictments are otherwise referred to in the Petition or in the record and this statement is therefore meaningless).

The Petition then says "The Commonwealth alone is charged with the duty of enforcing said Act of 1924 and as these Plaintiffs are advised, no other person is a necessary party to this suit." (R. 6.) There is no matter in dispute upon which a binding judgment can be rendered as the Plaintiffs state "that they have now opened their warehouse for the purpose of selling leaf tobacco at public auction," (R. 6) and are presumed to be conducting it in accordance with law. They nowhere state that they have in the past or intend in the future to violate any provisions of law or that they have been penalized in any particular under the law.

The sole purpose of this action, as repeatedly stated in the Petition, is to secure the advice of the United States Court as to how the Plaintiffs should conduct their business. For example, the Plaintiffs state in their Petition "that in the conduct of their said business and in conducting the sales of leaf tobacco at public auction, it is necessary for them to know whether said Act of 1924 is valid or invalid, and whether these plaintiffs are liable for the crimes therein denounced, and subject to the punishments and penalties prescribed in said Act of 1924,

and whether under said Act crimes innocently committed by him and the penalties therein prescribed imposed upon them, even though diligent efforts are made on their part to comply with the said law." (R. 2.)

The Plaintiffs also state that they make this application "for the purpose of (1) securing a declaration of their rights and duties under such Act of 1924 and (2) for the purpose of having this Court determine whether in the conduct of their business it will be necessary for them to comply with the provisions of said Act of 1923 or whether Chapter 10 of the Act of 1924 is invalid in whole or in part, and if so, in what part." (R. 2.)

The prayer quoted above is for a judgment declaring what the rights and duties of the Plaintiffs are and that the Act be declared invalid.

From the establishment of the Republic, it has been held that even upon the request of the Government, the United States courts will not render advisory opinions. When George Washington, as President, through Thomas Jefferson, as Secretary of State, requested the justices of the Supreme Court to answer certain questions concerning differences between the Executive and the Minister of France as to the meaning of treaties between the two countries, the justices replied that "considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, those gentlemen deemed it improper to enter the field of politics, by declaring their opinions on questions not growing out of the case before them." 5 *Marshall's Life of Washington,* 443, 441; 2 *Story Constitution 5th Edition, Sec.* 1571.

In the *Correspondence and Public Papers of John Jay,* Vol. 3, p. 486, it is said that the justices expressed the view that the power given by the Constitution to the

President of calling on heads of departments for opinions "seems to have been purposely, as well as expressly, united to the Executive Department".

It is clear that if there is no jurisdiction to make a declaration of rights upon request of the Government, that there is no jurisdiction to make a declaration of rights and to give advice upon the request of private citizens who may call in question legislative acts of the State or the United States.

The key case holding that the Federal Courts are at present without power to render declaratory judgments is *Muskrat* v. *United States* (1910) 219 U. S. 346, 55 L. ed. 246. In that case, Congress passed a law providing that Muskrat and others, on behalf of all Cherokee citizens, were "authorized and empowered to institute their suits in the Court of Claims to determine the validity of any act of Congress passed since said Act of July 1, 1902, in so far as said acts or any of them attempt to increase or extend the restrictions" upon lands allotted to Cherokee citizens.

Muskrat brought an action in the Court of Claims under the authority of the above Act of Congress to determine the validity of certain Congressional legislation and to have the same declared invalid in so far as it increased the number of persons entitled to share in the distribution of Cherokee lands. The case was dismissed for want of jurisdiction; and the words of Mr. Justice Day, after reviewing prior decisions of the Supreme Court, are so applicable to the case at bar that we may be pardoned for the following lengthy quotation, at page 361:

> "It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is

such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question confining jurisdiction of this court within the limitations conferred by the Constitution, which the court has

> hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."

The Muskrat Case, *Supra* has been followed in several recent cases. In *Texas* v. *Interstate Commerce Commission* (1921) 258 U. S. 158, 66 L. ed. 531, the State of Texas brought an action against the Interstate Commerce Commission and the Railroad Labor Board in order to raise the question as to whether the matters dealt with in several of the provisions of the Transportation Act fell within the field where Congress was entitled to speak within constitutional authority or within the field reserved to the several states. The Court said, page 162;

> "The claim of the state, elaborately set forth, is that they fall within the latter field, and therefore that the Congressional enactment is void. Obviously, this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."

Citing:

> *Georgia* v. *Stanton* (1867) 6 Wall. 50 at 73 *et seq.* 18 L. ed. 721 at 724.
>
> *Muskrat* v. *U. S.* (1910) 219 U. S. 346, 55 L. ed. 246.
>
> *Stearns* v. *Wood* (1915) 236 U. S. 75 at 78, 59 L. ed. 475, 476.

The case of *Stearns* v. *Wood* (1915) 236 U. S. 75, 59

L. ed. 475, was brought by Lieutenant Colonel Stearns against Brigadier General Woods as a so-called test case alleged to involve certain constitutional provisions and asking "a construction with respect to the right of the President and Congress over the National Guard of the several states and the status or legal relation of the officers thereof to the War Department; and raises the further question whether the National Guard or organized militia may be used without the territorial limits of the United States, as such."

The court said that the appellant "may not demand that we construe orders, Acts of Congress and the Constitution for the information of himself and others, notwithstanding their laudable feeling of deep interest in the general subject. The provisions of courts is to decide real controversies, not to discuss abstract propositions." Citing with approval:

Little v. *Bowers,* (1890) 134 U. S. 547, 557, 33 L. ed. 1016.

California v. *San Pablo & T. R. Co.* (1893) 149 U. S. 308, 314, 37 L. ed. 747, 748.

Richardson v. *McChesney,* (1910) 218 U. S. 487, 492, 54 L. ed. 1121, 1122.

Missouri K. & T. R. Co. v. *Cade,* (1914) 233 U. S. 642, 648, 58 L. ed. 1135, 1137.

In *Fairchild* v. *Hughes,* (1922) 258 U. S. 126, 66 L. ed. 499, suit was brought against the Secretary of State and Attorney General to restrain them from issuing a proclamation declaring that the Nineteenth Amendment to the Federal Constitution granting suffrage to women had been ratified and that it "be declared unconstitutional and void". Mr. Justice Brandeis, in determining that the Court had no jurisdiction, said of the action, on page 129,

"It is frankly a proceeding to have the Nineteenth

> Amendment declared void. In form it is a bill in equity; but it is not a case within the meaning of Section 2 of Article 3 of the Constitution which confers judicial power on the Federal courts for no claim of plaintiff is 'brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights or the prevention, redress or punishment of wrongs.' See *Re* Pacific R. Commission, 32 Fed. 241, 255 quoted in *Muskrat* v. *United States,* 219 U. S. 346, 357, 55 L. ed. 246, 250," 31 Sup. Ct. Rep. 250.

In *Keller* v. *Potomac Electric Power Co.* (1923) 261 U. S. 428, 67 L. ed. 731, the Public Utilities Law of the District of Columbia as enacted by Congress was involved. This Act provided that the Commission might by action in equity invoke the advice of the District Supreme Court upon the elements of value to be considered by it in arriving at the true valuation of the property of a utility. It further granted to any utility dissatisfied with any valuation the right to begin a proceeding in equity to vacate the same. A further provision permitted the Commission or an aggrieved party to appeal from an order of the District Court of Appeals to the Supreme Court of the United States. The Court held that by reason of the exclusive jurisdiction of Congress over the District of Columbia the provisions conferring jurisdiction on the courts of the District were valid but that the provisions with respect to the Supreme Court of the United States were invalid. Chief Justice Taft in his opinion said, at page 444:

> "The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the court in *Muskrat* v. *United States,* 219 U. S. 346, 55 L. ed. 246, 31 Sup. Ct. Rep. 250. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court and of the inferior courts of the United States, ordained and established by Congress under and by

virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them; and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies. *Hayburn's Case,* 2 Dall. 410, note, 1 L. ed. 436, note; *United States* v. *Ferreira,* 13 How. 40, 52, 14 L. ed. 42, 47; *Ex parte Siebold,* 100 U. S. 371, 398, 25 L. ed. 717, 726; *Gordon* v. *United States,* 117 U. S. 697; *Baltimore & O. R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216, 54 L. ed. 164, 30 Sup. Ct. Rep. 86."

The most recent decision reaffirming the doctrine of the Muskrat Case, *Supra,* is *New Jersey* v. *Sargent* (1926) U. S. 70 L. ed. 177, *Decided January* 4, 1926, *reported U. S. Supreme Court Advance Opinions, Feb.* 1, 1926. New Jersey brought a bill in equity against the Attorney General of the United States and members of the Federal Power Commission "to obtain a judicial declaration that certain parts of the Act of June 10, 1920 called the Federal Water Power Act * * * are unconstitutional in so far as they relate to waters within or bordering that state, and to enjoin the defendants from taking any steps towards applying or enforcing them in respect to those waters." The bill alleged that the challenged provisions of the Act "if applied and enforced, will interfere with the state's contemplated development of 'the aforesaid power projects', will jeopardize its policy respecting the conversion of potable waters and work serious injury to reservoirs constructed and used in that connection." However, there was no showing that the state was engaged or was about to be engaged in any work which the Act prohibited or was interfering or about to interfere with any work in which

the state was engaged. Mr. Justice Van Devanter reviewed and approved:

Georgia v. *Stanton,* (1867) 6 Wall. 50, 18 L. ed. 721;

Cherokee Nation v. *Georgia,* (1831) 5 Pet., 1 at 75, 8 L. ed. 25 at 52;

Marye v. *Parsons,* (1885) 114 U. S. 325, 29 L. ed. 205;

Muskrat v. *U. S.* (1911) 219 U. S. 346, 55 I. ed. 246; and

Texas v. *Interstate Commerce Commission,* (1922) 258 U. S. 158, 66 L. ed. 531.

In denying jurisdiction to entertain the New Jersey bill, Justice Van Devanter concluded that the restrictions of the Act complained of could not "be made the subject of judicial inquiry until they are given or about to be given some practical application and effect." He said, at page 182,

> "Naturally this will be after they become part of an accepted license, and after some right, privilege, immunity or duty asserted under them becomes the subject of actual controversy. Such a situation is not presented here. As respects the state's submerged lands, the bill signally fails to disclose any existing controversy within the range of the judicial power. Stating merely that the state will be deprived of revenue from the leasing of such lands is not enough. Facts must be stated showing that the act is being or about to be applied in a way which does or will encroach on or prejudicially affect the state's qualified right in the lands. There is no such showing."

See also *Chicago & Grand Trunk Railroad Co.* v. *Wellman* (1892) 143 U. S. 339, 36 L. ed. 176, in which the Court held that it was not a judicial function to determine friendly suits but only "real, earnest and vital controversies" between parties.

If the Federal courts are without jurisdiction to make declarations as to the validity of Federal laws, except in cases where a real controversy exists, it is doubly certain that the Federal courts have no jurisdiction to make declarations for the advice of the petitioners as to validity of state legislation.

The doctrine of the Muskrat case has also been followed in two well-reasoned cases by the Court of Appeals of New York. *The Matter of Reynolds* (1911) 144 App. Div. 458, 129 N. Y. S. 629 was a case very much like the case under consideration here. Sec. 5, Article 3 of the New York Constitution provided that Acts of the Legislature apportioning members of the State Assembly should be subject to review by the Supreme Court of New York at the suit of a citizen under reasonable regulations prescribed by the Legislature. Reynolds brought suit to have an Act apportioning members of the State Assembly declared unconstitutional. He made the Attorney-General, the Governor and other state officials parties defendant. The Court said that the proceeding was not in accord with known judicial procedure and that although parties were named as defendants they had no more interest in the law than other citizens. In holding that notwithstanding the provision of the State Constitution the court had no jurisdiction of an action of this kind, Judge Miller, speaking for the Appellate Division of the Supreme Court, said:

> "A party can not come to the court with an academic question and arbitrarily select some one with whom to debate * * * The Attorney General is the law officer of the State but the State is not a party to this proceeding although the suggestion is advanced * * * that by the service on the said officers the State (the words 'state organization' are used) was made party, precisely as though it were a private corporation and service had been made upon its president * * *."

The Court says nothing could be done if the defendants ignored the summons and to demonstrate the lack of jurisdiction, puts the query:

> "If so, jurisdiction to do what? Not to pass upon any rights against them as the Petitioners assert none. Not to grant any relief against them, for none is asked. Not to enjoin or command the doing of an act for there is nothing they can be enjoined from doing or commanded to do * * *. Of course, the Petition amounts to nothing but an invitation to the Court to express its views and the order to show cause has no more effect than an invitation to the officers named to debate the question and then to hear the Court expound the law * * *. Courts exist, not to expound the law, as is popularly supposed, but to determine the rights of litigants, to pronounce judgments and to issue process in execution. The constitutional validity of an Act of the Legislature is a question of law, but it does not become a judicial question until it arises in the regular way in the course of some judicial proceeding."

The Appellate Division quotes with approval from the Muskrat case. In affirming its judgment the Court of Appeals said:

> "We entertain the same view and concur with the opinion of Miller, *J.*, in the court below."

The case of *Hanrahan* v. *Terminal Station Commission of Buffalo* (1912) 206 N. Y. 494, 100 N. E. 414, is directly in point. Section 1279 of the Code of Civil Procedure provides that "The parties to a question in difference, which might be the subject of an action, being of full age may agree upon a case, containing a statement of the facts, upon which the controversy depends; and may present a written submission thereof to a court of record." There follow provisions enabling the court to take jurisdiction and render an opinion. Hanrahan and the Commissioners agreed upon certain facts and united in asking the Court to "*determine the constitutionality of said*

Act (*Chapter* 842 *of the Laws of* 1911 *of the State of New York*)." However, the Court of Appeals declined to do so and said, at page 417:

> "The provisions of statute authorizing the submission of a controversy are limited to controversies which can be followed by an effective judgment on the submission (citing cases).
>
> "Courts will not inquire into the constitutionality of an Act of the Legislature until a concrete case arises in which a decision of such question is unavoidable for the determination of the case itself. (citing cases).
>
> "Where a complainant has sustained no injury, and the object of the action is merely to obtain a declaration as to the constitutionality of a legislative act, the question presented to the court is merely an abstract one and the action will be dismissed. *Williams* v. *Hagood*, 98 U. S. 72, 25 L. ed. 51 * * *.
>
> "Abstract questions can not be made the subject of an action. They will not be answered, although it may appear that at some time in the future they will probably be the subject of a real controversy. A question which the courts will entertain must be in an action or proceeding where the necessary parties are before it, in which there is a subject matter, and where the determination of the court can be placed in a judgment or final order forever controlling upon the parties and their privies, and in which final process can be issued to carry the judgment or order into effect."

See also *Schieffelin* v. *Komfort* (1914) 212 N. Y. 520, 106 N. E. 675, specifically approving and following the Muskrat case.

Woodruff v. *People* (1908) 193 N. Y. 560, 86 N. E. 562.

Metropolitan Trust Co. v. *State Board of Tax Commissioners* (1917) 220 N. Y. 344, 115 N. E. 1000.

In these New York cases attempts were made in the

Constitution and by the State Legislature to enable the courts to give advisory opinions but this power was said not to be a judicial function until a real controversy arose with adverse parties and a subject matter so that the judgment of the court would finally conclude the issues.

In view of the above decisions, there may be some just doubt as to the constitutionality of any legislation which Congress may enact in the future to confer jurisdiction upon the judicial branch of the Government to make declarations of rights, particularly where an actual controversy does not exist between the parties. However, no such legislation has so far been enacted. Up to the present time Congress has specifically refused to pass legislation enabling the Federal courts to render declaratory judgments. The District court was therefore without jurisdiction in the present case, both because no ground of Federal jurisdiction was presented and because the Court had no power, under the Constitution and the Acts of Congress conferring jurisdiction upon District Courts, to grant the relief prayed for.

B. *The Federal Practice and Conformity Act Does Not Enable Federal Courts to Render Declaratory Judgments Under State Declaratory Judgment Laws.*

Counsel for Plaintiffs admit that the Federal courts have no jurisdiction of the present action unless jurisdiction may be said to exist under the Kentucky Declaratory Judgment Law by reason of the Federal Conformity and Practice Act. The conclusive answer to this unique suggestion is that the Conformity Act relates only to (1) practice; (2) pleadings; and (3) forms and modes of proceedings in civil causes, other than equity and admiralty causes, and does not directly or indirectly at-

tempt to extend or enlarge the jurisdiction granted to the district courts by Act of Congress. Nor can a state, by the adoption of a declaratory judgment law, or otherwise, extend or enlarge the jurisdiction of the United States courts as limited by the Constitution and the laws passed by Congress.

At the outset, it should be noted that the Kentucky Declaratory Judgment law was only intended to apply to the courts of the State of Kentucky. The Act begins with the words "Be it enacted by the General Assembly of the Commonwealth of Kentucky:" "In any action in a court of record of *this Commonwealth* having general jurisdiction wherein it is made to appear an actual controversy exists, the plaintiff may ask for a declaration of rights, * * *".

Section 5 provides how appeals are to be taken and that a party aggrieved by a declaratory judgment rendered in the *Circuit Court* (of Kentucky) must, within sixty days, perfect an appeal to the Court of Appeals (of Kentucky), which must advance the same for immediate hearing and submission. This section has been so strictly construed by the Kentucky Court of Appeals in *Livingston County et al.* v. *Adams* (1923) 199 Ky. 127, that an appeal filed within sixty-two days was dismissed.

The entire context of the Act shows that it is applicable only to the courts of the state of Kentucky and was not intended to and can not be made to apply directly or indirectly to the United States District Court.

Much of what Mr. Justice Holmes says in *Chandler* v. *Dix* (1904) 194 U. S. 590, 48 L. ed. 1129, applies here. He said, at page 592:

> "These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control."

There is nothing in the Federal Conformity Act to warrant the idea that the United States District Court is required by that Act to enlarge its jurisdiction to conform to the Kentucky Declaratory Law. The Conformity Act, Section 914, U. S. Revised Statutes; U. S. Compiled Statutes, Sec. 1537; 6 Fed. Stat. Annotated, 2d Edition, page 21 reads:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such (circuit or) district courts are held, any rule of court to the contrary notwithstanding. (R. S. Sec. 914.)".

This Court conclusively denied the claim that the Federal Conformity Act can be invoked as a medium for giving the Federal courts jurisdiction under state statutes in *So. Pac. Co.* v. *Denton* (1892) 146 U. S. 202, 36 L. ed. 942. In that case it was contended that the United States courts obtained jurisdiction of the defendant because, under the provisions of the statutes of Texas, an appearance, although in terms limited to an objection to a jurisdiction, constituted a waiver of immunity of jurisdiction by reason of non-residence. The court said that the question was not whether the Texas law was valid in the courts of that state but whether it could be held applicable to actions in the courts of the United States. In deciding that the Texas statute was not applicable to the Federal courts, Mr. Justice Gray said:

> "In one of the earliest cases that arose under this Act, this court said: 'The conformity is required to be "as near as may be"—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose: it devolved upon the judges to be affected the duty

of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.' *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 300, 301 (23: 898, 901).

"Under this Act, the circuit courts of the United States follow the practice of the courts of the State in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defenses on the merits shall be pleaded successively or together. *Delaware County Comrs.* v. *Diebold Safe & L. Co.* 133 U. S. 473, 488 (33: 674, 680); *Roberts* v. *Lewis*, 144 U. S. 653 (36: 579). *But the jurisdiction of the circuit courts of the United States has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a State. Toland* v. *Sprague*, 37 U. S. 12 Pet. 300, 328 (9: 1093, 1104); *Cowles* v. *Mercer County*, 74 U. S. 7 Wall. 118 (19: 86); *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 286 (20: 571, 577); *Phelps* v. *Oaks*, 117 U. S. 236, 239 (29: 888, 889). And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. *Ex parte Fisk*, 113 U. S. 713, 721 (28: 1117, 1120); *Whitford* v. *Clark County*, 119 U. S. 522 (30: 500)." (Italics ours).

In *Mexican Central R. Co.* v. *Pinkney* (1893) 149 U. S. 194, 37 L. ed. 699, the Court again considered the same statute and in the sixth paragraph of the syllabus said:

"It was not the intention of Congress to leave the jurisdiction of the inferior Federal courts to the regulation and control of state legislation."

To the same effect are:

Indianapolis & St. L. R. Co. v. *Horst* (1876) 93 U. S. 291, 23 L. ed. 898.

Shepard v. *Adams* (1898) 168 U. S. 618, 42 L. ed. 602.

Slocum v. *N. Y. Life Ins. Co.* (1913) 228 U. S. 364, 57 L. ed. 879.

County of Bath v. *Amy* (1872) 13 Wall. 244, 20 L. ed. 539.

Goodyear Mach. Co. v. *Dancell* (1902) 119 Fed. 692.

Davidson Wesson Implement Co. Ltd. v. *Parlin* (1905) 141 Fed. 37.

Hughey v. *Sullivan* (1897) 80 Fed. 72.

In *Shoemaker* v. *Security Life Co.* (1908) 159 Fed. 113, it was held that the provisions of a Pennsylvania Act with respect to error proceedings did not apply to the Federal court. In this connection, Dallis, *J.*, said, at page 113:

> "We cannot assent to the suggestion of counsel that section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684) would justify the assumption by this tribunal of the jurisdiction which the Pennsylvania act of April 18, 1874 (P. L. 64), imposed upon the Supreme Court of that state. That section refers in terms to Circuit and District Courts, and to the state within which such courts are held. It is inapplicable to a subsequently created appellate court for a circuit comprising several states. Moreover, it requires conformity with state law and practice only in whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding, and not even in such matters where Congress itself has legislated upon the subject and prescribed a rule. *A question of jurisdiction is not within the categories mentioned;* and upon the subject of reviewable judgments Congress, as we have seen, has legislated and prescribed the rule. *Amy* v. *Watertown,* 130 U. S. 305, 9 Sup. Ct. 530, 32 L. ed. 946."

The general rule is well stated in *Foster on Federal*

Practice, 6th Edition, Vol. 3, Sec. 453, pp. 2202 *et seq.* The author says:

> "The phrase 'as near as may be' has been held not to mean 'as near as may be possible' nor 'as near as may be practicable' but to devolve upon the Federal courts the duty of construing and deciding, and to give them the power to reject any subordinate provision in such state statutes, which in their judgment would unwisely encumber the administration of the law to tend to defeat the ends of justice in their tribunals * * *".

To permit parties in advance of any actual controversy to invoke the jurisdiction of Federal courts under state statutes for the advice of the District Courts as to their duties under state laws and as to the constitutionality of such laws under both the state and Federal constitutions would unwisely encumber the administration of the law in the Federal courts. The Federal district courts are now heroically struggling with crowded dockets and actions of this kind are of such a nature that the court below was amply justified in declining the additional jurisdiction and burden which such litigation would unnecessarily impose.

No question of practice, pleading or procedure is involved. The question presented is exclusively one of *jurisdiction*.

Jurisdiction to declare rights in a case of the character at bar is not granted by the Constitution or by Congress. Jurisdiction that Congress has directly declined to grant is certainly not to be found by indirection under the Conformity Act; nor can the various states of the Union impose such additional burdens or powers upon courts of the United States.

III.

This Is an Action Against the State of Kentucky, to Which the Judicial Power of the United States Does Not Extend.

The Defendant in this action is the Commonwealth's Attorney for the Nineteenth Judicial District of Kentucky. This Defendant is expressly named as the representative of the State of Kentucky. The Plaintiffs say in their petition "He is made a party defendant herein as the representative of the Commonwealth who is charged with the duty of the enforcement of said Act of 1924." (R. 6.) The Petition also states: "A copy of the Petition, in accordance with the law, will be served upon the Attorney General of the State of Kentucky, who has the right to be heard in his own name, or through the Commonwealth's Attorney for the Nineteenth Judicial District. *The Commonwealth alone is charged with the duty of enforcing said Act of* 1924, *and, as these plaintiffs are advised, no other person is a necessary party to this suit.*" (R. 6.)

Nowhere in the Petition is this Defendant or the Attorney General of the State shown to have any particular interest in the matters set forth in the Petition. No charge is made that the Defendant or the Attorney General have taken any specific action or are threatening to do so. The reason this Defendant is made a party, although he has no adverse interest and is engaged in no controversy with the Plaintiffs, is frankly stated to be because he is a representative of the State.

The State must necessarily be made a party under the Kentucky Declaratory Judgment Law where the interpretation of a statute is requested.

The law provides, in Section 6:

> "In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the petition and be entitled to be heard."

It is entirely proper for the State of Kentucky to provide that the state may be made a party to an action in its own courts to interpret its own statutes at the suit of a pary affected thereby. However, it is entirely improper for two Plaintiffs, one a citizen of North Carolina and the other a citizen of Kentucky, to prosecute the State of Kentucky in the United States courts, in which it has not consented to be sued and before which courts it cannot be brought in a suit of this character under the provisions of the Eleventh Amendment of the Constitution of the United States. The Eleventh Amendment of the Constitution of the United States reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment has been construed to preclude a suit against a state by one of its own citizens as well as by a citizen of another state. *Hans* v. *State of La.* (1890) 134 U. S. 1, 33 L. ed. 842; *State of North Carolina* v. *Temple* (1890) 134 U. S. 22, 33 L. ed. 849.

The fact that the Declaratory Judgment Law provides for the appearance of the State in an action brought "in a Court of Record of this Commonwealth" (Ky.) does not give the United States courts any jurisdiction. This

is specifically held in *Smith* v. *Reeves, as Treasurer of California* (1900) 178 U. S. 436, 44 L. ed. 1140. In that case the State consented to a suit against its Treasurer by any party claiming that taxes were illegally exacted from him. It was claimed that such a suit could be maintained in the United States court. This court denied the claim and in so doing said, at page 441:

> "But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the Statute but such we think, is its meaning. The requirement that the aggrieved tax payer shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the County of Sacramento', indicates that the state contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals * * *. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and Laws of the United States."

After examining cases cited to support the claim that the State could not restrict its consent to be sued, to actions brought in its own courts, the Supreme Court said, at page 445:

> "Nothing heretofore said by this court justifies the contention that a state may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts"—subject always to the condition that the judgment of the highest court of the state in any action brought against it with its consent may be reviewed by the Supreme Court of the United States if it denies to the plaintiff any right, title or immunity secured to him under the Constitution or Laws of the United States. This rule is so strictly enforced that it has been held that the Attorney General of a state, in

the absence of specific statutory authority, may not waive the exemption of the state from suit in the United States Courts. See *Farish* v. *State Banking Board of Oklahoma* (1915) 235 U. S. 498, 59 L. ed. 330.

However, in the present action there is no consent by the state of Kentucky to a suit in the United States courts and no waiver of its immunity from such suit. The Defendant here sued as the Representative of the State, specifically demurred at the first opportunity to this action on the ground that the court had no jurisdiction to entertain it.

It has frequently been held that suits may be maintained against the Attorney General or some other officer of the state to prevent such officer from doing some specific act under color of an unconstitutional state law and that such acts are not suits against the State. There is a wide difference between such cases and the action at bar.

In the action now before the court, no injunction or order of any kind is asked against the Defendant or the Attorney General; first, because it is not alleged that the Defendant has done or is threatening to do any unlawful act or has taken or is threatening to take any particular action lawful or unlawful; and *second,* because this is not an action for an injunction but for a declaration of rights and for an opinion as to the constitutionality of a state law.

Obviously the effect of a judgment declaring a state law unconstitutional would be to suspend the operation of such law and yet escape the specific provisions of Sec. 266 of the Judicial Code providing that "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of the state

by restraining the action of any officer of such state and the enforcement or execution of such statute * * * shall be issued or granted by any justice of the Supreme Court or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as District Judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a Circuit Judge, and the other two may be either Circuit or District judges, and unless a majority of said three judges shall concur in granting such application." (June 18, 1910, C. 309, Sec. 17, 36 Stat. 557; Mar. 3, 1911, C. 231, Sec. 266, 36 Stat. 1162; March 4, 1913, C. 160, 37 Stat. 1013; Feb. 13, 1925, C. 229, Sec. 1, 43 Stat. .....). Then follow other important provisions of the law applicable to actions for injunctions thereunder.

The above provision of law is referred to for the purpose of showing the great difference between actions against state officers to *enjoin* them from doing specific acts and an action of this character in which the state officer is only made a party as the representative of the state for the purpose of *testing* the Constitutionality of a state law, and because the provisions of the Declaratory Judgment Law require that the state be made a party in its own courts when an action is brought under such law to determine the validity of a state law.

This action falls directly within the ruling of this court in *Fitts as Attorney General of the State of Alabama and A. H. Carmichael as Solicitor of the 11th Judicial Circuit of the State of Alabama* v. *McGhee* (1899) 172 U. S. 516, 43 L. ed. 535. In that case Alabama en-

acted a law establishing maximum rates of toll to be charged for crossing a bridge over the Tennessee River and providing a penalty for a violation of the law. The receivers of the bridge filed a bill against the Governor and Attorney General to enjoin them from instituting any proceedings that penalized them on account of this Act, which was alleged to be unconstitutional. Subsequently the Governor and the State were dismissed. The Attorney General and the Solicitor for the judicial circuit involved were enjoined by the District Court from instituting or prosecuting any indictment or criminal proceeding against anyone for violating the above act, which was held unconstitutional. However, upon appeal, this court held that the action was in reality an action against the state and in so doing, used words which apply so directly to the case at bar that we quote the language of the court at some length, at page 529:

> "If these principles be applied in the present case there is no escape from the conclusion that, although the state of Alabama was dismissed as a party defendant, this suit against its officers is really one against the state. As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9th, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. *If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination,* in a suit against them, of the question of the right to such possession, by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state. In the case supposed they would be compelled to make good the state's claim to the property, and

could not shield themselves against suit because of their official character. *Tindal* v. *Wesley*, 167 U. S. 204, 222 (42: 137, 143). No such case is before us.

"It is to be observed that neither the attorney general of Alabama nor the solicitor of the eleventh judicial circuit of the state, appears to have been charged by law with any special duty in connection with the act of February 9th, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were *Poindexter* v. *Greenhow*, 114 U. S. 270 (29: 185); *Allen* v. *Baltimore & Ohio Railroad Co.* 114 U. S. 311 (29: 200); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (35: 363); *Re Tyler*, 149 U. S. 164 (37: 689); *Reagan* v. *Farmers' Loan and Trust Co.* 154 U. S. 362, 388 (38: 1014, 1020, 4 Inters. Com. Rep. 560); *Scott* v. *Donald*, 165 U. S. 58 (41: 632); and *Smyth* v. *Ames*, 169 U. S. 466 (42: 819). Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, *they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and*

the attorney general, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination." (Italics ours).

To the same effect are *Hagood* v. *Southern* (1886) 117 U. S. 52, 67, 29 L. ed. 805, 810; and *Re Ayres* (1887) 123 U. S. 443, 31 L. ed. 216.

The Fitts case has been reaffirmed upon several recent occasions. In *Dunbe* v. *New Jersey* (1920) 251 U. S. 311, 64 L. ed. 280, an original action was brought in this court against officers of the United States and of the state of New Jersey to enjoin them from enforcing the 18th Amendment to the Constitution of the United States. It was claimed that such actions were within the original jurisdiction of this court, but the court denied this claim and said at page 313:

"But it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the au-

thority to entertain a suit brought by a citizen against his own state without its consent." Citing:

Hans v. *Louisiana* (1889) 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504.

North Carolina v. *Temple*, (1889) 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509.

California v. *So. Pac. Co.* (1895) 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591.

Fitts v. *McGhee*, (1899) 172 U. S. 516, 524, 43 L. ed. 535, 539, 19 Sup. Ct. Rep. 269.

In the *Matter of the State of New York* (1921) 256 U. S. 490, 65 L. ed. 1057, libels in rem were filed in the United States District Court against certain tugs chartered by the Superintendent of Public Works of the State of New York under authority of an Act of the New York Legislature. It appeared that the charter had expired so that there was no res belonging to the state brought under the jurisdiction of the District Court; and the proceedings were against the Superintendent of Public Works in his capacity as a public officer. It was claimed that such a suit could be maintained under the admiralty law. This court denied that claim and said that it was not shown that the superintendent was acting otherwise than in due course of his duty under the Constitution and Laws of the state and that the proceedings were in effect suits brought against the state and beyond the jurisdiction of the courts of the United States. In discussing what constitutes a suit against the state, the court said, page 500:

"As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (*Osborn* v. *Bank of U. S.* 9 Wheat. 738, 846, 850, 857, 6 L. ed. 204, 229, 231, 232) has long since been abandoned and it is now established that

the question is to be determined: not by the mere names of the titular parties, but by the essential nature and effect of the proceeding as it appears from the entire record."

The court cites, with approval, *Fitts* v. *McGhee, Supra,* page 497, and quotes from *Pennoyer* v. *McConnaughy,* (1891) 140 U. S. 1, at 10, 35 L. ed. 363, 365, to the effect that the decided cases fall into two principal classes; *first,* the class where suit is brought against the officers of the state as representing the state's action and liability, thus making it, although not a party to the record, the real party against which the judgment will operate; and *second,* where a suit is brought against defendants who claim to act as officers of the state and under color of an unconstitutional statute, commit acts of wrong and injury, to rights and property of the plaintiff.

The United States courts have jurisdiction of the second class and do not have jurisdiction of the first class of these cases.

The action at bar falls under the first class of cases and is to be clearly distinguished from the second class, of which *Ex parte Young* (1908) 209 U. S. 123, 52 L. ed. 714, is a good example. In that case it was held that officers of a state might be enjoined from taking specific action under an unconstitutional statute to the specific injury of the rights of the plaintiff. The difference between such a case and *Fitts* v. *McGhee* was carefully pointed out. All the cases upon this question are so carefully reviewed in *Ex Parte Young,* both in the opinion of the court and in the elaborate dissent of Mr. Justice Harlan, that it seems unnecessary to do more than refer to one other recent case; namely, *Cavenaugh* v. *Looney, Attorney General of Texas* (1919) 248 U. S. 453, 63 L. ed. 354, in which an action was bought to restrain

the Attorney General and Board of Regents of the University of Texas from condemning land under a Texas law alleged to be unconstitutional. In holding that the court below was right in refusing to take jurisdiction, Mr. Justice McReynolds said that although it was now settled that individuals clothed with a specific duty in regard to the enforcement of the laws of the state who are about to do an illegal act violating the Federal Constitution, may be enjoined, no such injunction ought to be granted unless the case is free from doubt and the injunction necessary to prevent great and irreparable injury. He added, at page 456:

> "The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable. * * * Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a Federal right, the appropriate and adequate remedy by review here is obvious."

We have here simply a situation in which Plaintiffs, who are interested in the business regulated by a state law, wish to ascertain whether, in the opinion of the United States courts, that law is constitutional. In order to frame an issue and to meet the requirements of the Kentucky Declaratory Judgment Law when the validity of a statute is involved, they have made the representative of the Attorney General of the State a party. The proceeding is nothing more or less than an effort to make the state of Kentucky defend the constitutionality of its laws in the courts of the United States, in a primary action begun there in the first instance and without earlier resort to the State Courts. The prosecution

of such an action is plainly prohibited by the Constitution and is beyond the jurisdiction of the Federal courts.

IV.

The Present Action Does Not Warrant the Rendition of a Declaratory Judgment Under the Terms of the Kentucky Declaratory Judgment Law, Even if the Federal Courts Had the Requisite Jurisdiction.

Under the previous headings of this brief we have shown that the Federal courts do not have jurisdiction of the parties or subject matter of this action and are also without jurisdiction to render declaratory judgments. However, even if such jurisdiction existed, the present action is not of such a character as to warrant its exercise. A Kentucky court acting under the Kentucky Declaratory Judgment Law, as construed by the highest court of that state, would have declined to take jurisdiction of this action under the circumstances which existed at the time that the United States District Court dismissed the Plaintiffs' Petition.

In this connection it is important to observe that the Declaratory Judgment Law does not make it mandatory upon the court to make a declaration of rights but leaves it to the discretion of the court to determine whether such a declaration is necessary or proper under all the circumstances. Furthermore, jurisdiction is expressly limited to cases in which an "actual controversy exists".

Section 2 of the Declaratory Judgment Act provides that any person whose rights are affected by the statute may apply for a declaration of his rights or duties even though no consequential or other relief be asked, "provided always that an actual controversy exists with respect thereto".

Section 6 gives the court a wide discretion and provides "The court may *refuse* to exercise the power to declare rights, duties, or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, *or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances.*" The same section further provides that, if in the opinion of the Appellate Court, "*The action is prematurely brought, or where a ruling in the Appellate court is not considered necessary or proper at the time under all the circumstances, it may direct a dismissal without prejudice in the lower court.*"

Under the above sections of the Kentucky Statute, the United States District Court was amply justified in the exercise of a wise discretion in declining to take jurisdiction of this action for the reason that such jurisdiction was neither necessary nor proper.

Before the present action was brought in the United States Court on December 11, 1924 (R. 1), similar actions were brought in November, 1924 in the Fayette Circuit Court of Kentucky by the *Jewell Tobacco Warehouse Co., The New Independent Tobacco Warehouse Co., The Virginia Avenue Warehouse Tobacco Co. and T. C. Gary* and others for a declaration of rights and a judgment declaring the Act of 1924 regulating the sale of leaf tobacco at public auction unconstitutional. The Fayette Circuit Court then rendered a judgment construing the Act and holding it valid and constitutional. Before any order was made by the U. S. District Judge dismissing the present action, the Court of Appeals of Kentucky announced its opinion affirming the judgment of the Circuit Court; construing the Warehouse Act, and rendered a declaratory judgment defining the rights

and duties of Loose Leaf tobacco warehouses thereunder and upholding the constitutionality of the law. *Jewell Tobacco Warehouse Co. et al.* v. *Kemper* (1925) 206 Ky. 667, 268 S. W. 324. The Jewell case was decided January 20, 1925 and the order sustaining the demurrer of the Defendant in the present action was not filed until *Feb. 4, 1925* and the judgment dismissing the Plaintiffs' Petition was not entered until *Feb. 16, 1925.*

Hence it was entirely unnecessary for a United States court to render another declaratory judgment in a similar action defining the rights and duties of a similar plaintiff with respect to the same law.

Any doubt or uncertainty as to the interpretation of the Warehouse Act of 1924 or the duties or the liabilities of warehousemen thereunder was set at rest by the decision in the Jewell case so that at the time that the demurrer was heard in the United States court any doubtful questions had been determined and the questions raised by the Petition of the Plaintiffs were moot. It has long been established that courts will not decide moot questions even though the question becomes moot during the pendency of the case. In *People of California* v. *San Pablo & Tulare R. Co.* (1893) 149 U. S. 308, 37 L. ed. 747, the Court said:

> "But the court is not empowered to decide moot questions or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel whether in the case before the court or in any other case, can enlarge the power, or affect the duty of the court in this regard."

Richardson v. *McChesney* (1910) 218 U. S. 487, 54 L. ed. 1121.

Trega v. *Modesto Irrigation District* (1896) 164 U. S. 179, 41 L. ed. 395.

The same rule is applied even in actions for declaratory judgments in states having declaratory judgment laws.

West v. *Wichita,* (1925) 118 Kan. 265, 234 P. 978.

Tanner v. *Boynton Lbr. Co.* (1925) 129 Atl. 617 (New Jersey).

It is the settled rule of the United States courts to follow the decision of the highest court of a state in the construction and interpretation of state laws and their constitutionality in so far as local practice and the state constitution are concerned.

Hunter v. *Pittsburgh* (1907) 207 U. S. 161, 52 L. ed. 151.

Edward Hines Yellow Pine Trustees v. *Martin* (1925) 268 U. S. 458, 69 L. ed. 1050. Collecting cases at p. 462.

North Laramie Land Co. v. *Hoffman* (1925) 268 U. S. 276, 69 L. ed. 953.

Stebbins v. *Riley* (1925) 268 U. S. 137, 69 L. ed. 885.

If the decision of the Court of Appeals of Kentucky in the Jewell case denied the warehousemen any rights under the Constitution or Laws of the United States, their remedy was to secure a review of such decision in the Jewell case by this Court.

However, the several warehousemen represented by able counsel in the Jewell case did not seek such a review by this court and the judgment of the Court of Appeals of Kentucky declaring the Warehouse Law of 1924 valid and defining the rights and duties of warehousemen thereunder is final, binding and conclusive. The issue is clearly *res judicata.*

This is always held to be the effect of declaratory judgments in states where the same are upheld. For instance, in the excellent opinion of Judge Moschzisker, sustaining the Pennsylvania Declaratory Judgment Law. In *Petition of Kariher*, 131 A. 265, Adv. Sheet Jan. 14, 1926 (Pennsylvania), it is said:

> "Next, it may be noted that, since the numerous jurisdictions enjoying this practice all hold that a real controversy must exist, that moot cases will not be considered *and that declaratory judgments are res judicata of the points involved*, such judgments cannot properly be held merely advisory * * *."

It is true that the Plaintiffs in the present action are not the same warehousemen who were represented in the Jewell case, but their status is the same, the law involved is the same and the facts set forth in the petition in the present action are set forth in practically the same language as was used in the Jewell case.

To permit the warehousemen, after having secured a construction of the law and a declaratory judgment in the courts of Kentucky by the highest court of Kentucky, to commence another action upon the same state of facts, to secure another declaratory judgment, is clearly unnecessary and not warranted by the terms of the Act. Nor would it be proper to attempt thus indirectly to review in a United States District Court the judgment of the Court of Appeals of Kentucky. To permit the prosecution of the present action after the decision in the Jewell case would defeat the very purpose of declaratory judgment laws, which is said to be "to terminate the uncertainty or controversy which give rise to the action" (Sec. 6) and "to make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty and insecurity with respect to rights, duties and relations" * * *. (Sec. 10).

A duplication of actions for declaratory judgments with respect to the same state of facts and the same law by parties occupying the same status and particularly the maintenance of an action in the Federal courts after there has been a decision in the State courts, makes for uncertainty and insecurity in place of the certainty, finality and security aimed at by the Act.

It is for this reason that it has been held by the Court of Appeals of Kentucky in construing the declaratory judgment law that a declaration of rights will not be made in any case where there has been a previous adjudication of similar questions. Unless the doctrine of *res judicata* is applied to Declaratory Judgments, there will be no end to possible litgation under the Declaratory Judgment Law.

In *Proctor et al.* v. *Avondale Heights Co.* (1923) 200 Ky. 447, an action was brought for a declaratory judgment. It appeared that the same issues were involved in an injunction suit previously filed and set for hearing on its merits. The court in refusing to grant a declaratory judgment, said, at page 453:

> "Under the express provisions of Section 6 of the Declaratory Judgment Act the trial court may refuse to exercise its power to declare rights 'where the declaration or construction is not necessary or proper at the time under all the circumstances'.
>
> "Under the facts presented here the court should have exercised the plain discretion thus given by declining to declare any rights in the action except the right to make a conveyance to the Water Company according to the terms of its contract, and should have left the other matters in issue for a final determination in the injunction suit.
>
> "Judgment reversed."

A recent ruling with respect to declaratory judgments was made by the Kentucky Court of Appeals in *Shearer*

& Ramsey v. *Becker et al* (1925) 207 Ky. 455. In that case the court was asked by a declaratory judgment to answer certain questions which it was claimed arose concerning title under a deed. As to the second question, the court, said, at page 459:

> "Questions already adjudicated by a court having jurisdiction ~~made and~~ the parties, cannot thereafter between be the subject between such parties for their privies of 'an actual controversy' within the meaning of those terms in Sections 1 and 6 of the Declaratory Judgment Act * * * The third and fourth questions may not be thus precluded, but no one of them presents a question of 'rights' or 'duties' about which 'an actual controversy exists' and none of them calls for an exercise of the jurisdiction conferred by the Declaratory Judgment Act."

It has uniformly been held by the English and Canadian courts, where power to render declaratory judgments has existed for a long time, that a court will not exercise its discretion to render a declaratory judgment in actions over which jurisdiction is vested in another court.

Grand Junction Water Works Co. v. *Hampton Urban District Counsel* (1898) 2 Ch. 331, 67 L. J. Ch. N. S. 603, 78 L. T. N. S. 673.

N. Y. & O. R. Co. v. *Cornwall* (1913) 29 Ont. L. Rep. 522.

Mutrie v. *Alexander* (1911) 23 Ont. L. Rep. 396.

Barraclough v. *Brown* (1897) A. C. 615, 66 L. J. Q. B. N. S. 672, 76 L. T. N. S. 797.

Not only is a declaration of rights in the Federal courts unnecessary in view of the prior declaration by the Court of Appeals of Kentucky, but as we have previously pointed out, there is no case or controversy between the parties.

Under the terms of the Kentucky Declaratory Judg-

ment Act, there is no jurisdiction unless "it is made to appear that an actual controversy exists". Sec. 1. Section 2 likewise states that a person interested under a statute may apply for a declaration of rights or duties provided "always that an actual controversy exists with respect thereto". Section 4 provides that if the application be deemed sufficient, the court may grant further relief based on a declaratory judgment against "any adverse party whose rights have been adjudicated by the declaratory judgment." Section 9 provides that "all persons shall be made parties who have or claim any interest which would be affected by the declaration".

It is apparent from reading the Petition that no "actual controversy *exists*". It is possible that a controversy may arise between the Plaintiffs and adverse parties over some act or omission covered by the warehouse law. The anticipated controversy has not arisen. No act or omission to act is referred to in the Petition. There is no adverse party except the State of Kentucky by reason of its interests in its own laws. A considerable part of the Petition is given up to setting forth the contract of the Burley Tobacco Growers Association with its members and it is alleged that the Burley Tobacco Growers Association sponsored the Warehouse Act of 1924. It is difficult to see what these allegations have to do with the action, since all legislation must have a sponsor. However that may be, the Burley Tobacco Growers Association is not alleged to be an adverse party, nor to have an interest in this controversy; nor is it made a party defendant.

The Petition does recite that a controversy exists, in that the Plaintiffs have been threatened with civil and criminal punishments and penalties for violation of the Warehouse Act. So far as the Petition shows, these threats are anonymous. It is not charged that the De-

fendant or any other described party has made any threats. The mere fact that anonymous threats have been made does not show that a controversy exists, particularly as the Plaintiffs do not say that they have violated or intend to violate the Warehouse Act. When any violation occurs and when any effort is made to assess a penalty or to punish the Plaintiffs according to law for such violation, then a controversy may arise. That situation is not before the court; and the present action is premature.

By its language there is no jurisdiction under the Kentucky Declaratory Judgment Law of an action brought prior to or in anticipation of an actual controversy.

Section 6 provides that when the action is "prematurely brought" it must be dismissed. In this respect the Kentucky Act differs from the Michigan Act, which was declared unconstitutional in *Anway* v. *Grand Rapids R. Co.* (1920) 211 Mich. 592, 179 N. W. 350, because it did not limit the power of the court with respect to declaratory judgments to cases where an actual controversy existed. The Kentucky Act expressly limits the jurisdiction of its courts to cases where actual controversies exist and does not permit declaratory judgments in anticipation of future controversies or situations which have not yet arisen.

The Court of Appeals has so held and in *Shearer* v. *Backer*, 207 Ky. 455 cited above, the court said that no one was questioning the title to the real estate involved and that

> "After appellants have accepted a warranted title and are in full and undisputed possession of the land, what may or may not happen to their title or possession is simply a speculative argument that is not now and may never become an actual controversy about rights or duties, and it was not the purpose of the Declaratory Judgment Act to impose upon the

> courts the burden of answering such abstract and speculative propositions of law simply to satisfy the curiosity *or fears* of the parties about possible controversies that may or may not arise out of the executed contract. This is made quite clear by the Act itself and all such acts have uniformly been so construed so far as we can find. See 2 R. C. L. 1069 and note in annotated cases 1917 (b) 651 and 12 A. L. R. 69. The court did not err in refusing to answer the questions propounded."

In *Axton* v. *Goodman* (1924) 205 Ky. 382, 265 S. W. 806, an action was commenced by the candidates of the Progressive Party to obtain a declaration of their right to appoint challengers and inspectors. It appeared that the Attorney General had advised the chairman of the Progressive Party in writing that such party was not entitled to challengers and inspectors. Thereupon three candidates brought an action against the clerk of the Court of Appeals who was ex-officio chairman of the State Board of Elections and against the Attorney General of Kentucky and the Sheriff of Franklin County who was ex-officio chairman of the Board of Elections for the County, The court held that there was no jurisdiction to render a declaratory judgment. In the course of the court's opinion, Judge Clay said, page 384:

> "The Declaratory Judgment Act plainly contemplates that there shall be an actual controversy between persons having an interest in the subject matter of the action, or between persons whose rights or duties are affected by the statute sought to be construed. For instance, if A has a contract with B, he will not be entitled to a declaration of his rights under the contract merely because the proper interpretation of the contract is a matter of dispute between him and C, or some other person who has no interest whatever in the contract."

The court said that the defendants had no duties with respect to the appointment of challengers and no rights to be affected by their admission or exclusion.

> "Therefore the Petition presents a case of *mere*

difference of opinion and not an actual controversy between the parties in interest. Not only was no cause of action stated against the defendants, but no one whose rights or duties are affected by the statute in question was made a party to the proceeding. Therefore, there was a defect of parties apparent in the petition, and the special demurrer was properly sustained. Civil Code Sec. 92. But, we are asked to go ahead and decide the question. This we can not do in the absence of an actual controversy and with no opposing party before the court to represent those whose rights may be affected by the decision."

In *Kelly* v. *Jackson* (1925) 206 Ky. 815, 268 S. W. 539, the lower court made a declaration that the legal voters living in a certain district were entitled to vote as to whether or not they wished certain cattle to run at large in that district although no election was imminent. The Court of Appeals reversed the lower court and said, at page 817:

"By the above, the court undertook to decide a question that it was asked by an amended petition to settle for the parties. There is no suggestion that an actual controversy exists—it only appears to be a mooted neighborhood question. Courts are not provided for the settlement of arguments or differences of opinion but actual controversies involving legal rights. No election has been called; no one has any present right to vote on the question that anyone is disputing. The amended petition presented only a moot question and should have been dismissed."

Moot questions will not be determined in Kentucky under the Declaratory Judgment Act.

In *Ezzel* v. *Exall* (1925) 207 Ky. 615, 269 S. W. 752, the court declined to give a declaratory judgment where all the parties to be affected were not included and said that all those who have an interest in a controversy in which a declaratory judgment is asked must be made parties.

From the above decisions it is manifest that if the present action had been brought in the courts of Kentucky and proper objection had been made thereto, the Kentucky courts would not have taken jurisdiction. If it be assumed, for the sole purpose of argument, that the United States court could exercise any power under a state Declaratory Judgment Act, such court was certainly justified in declining to exercise its discretion in favor of a declaratory judgment in the present action.

This is also the rule in other states where the Uniform Declaratory Judgment Law has been enacted. In *West v. City of Wichita* (1925) 118 Kan. 265, 234 P. 978, the plaintiff brought a suit under the Kansas Declaratory Judgment Law to have certain parts of a city zoning law declared unconstitutional. He claimed that the law was unreasonable with respect to certain uses to which he might want to put his property in the future. The court declined to render a declaratory judgment and in so doing, said:

> "The Declaratory Judgment Law is available only 'in cases of actual controversy' R. S. P. 60-3127. The zoning ordinance may be unreasonable when applied to a specific use which an owner desires to make of specific property, but until such a situation is presented there is no actual controversy between the owner of property and the city concerning the zoning ordinance."

The court said that otherwise its opinion might be asked upon questions which "may never arise."

In *Tanner v. Boynton Lbr. Co.* (1925) 129 Atl. 617 (N. J. Ch.), the court said:

> "To entitle complainants to have this court consider the situation set out in their bill and to render a declaratory judgment thereon, it should appear from the facts alleged that they have present rights against the persons whom they make parties to the proceedings, with respect to which they may be en-

titled to some relief. If it appears from the bill that the complainants can have no relief as against any party they have named as a defendant, such party should not be forced into a litigation which can have no final result in favor of complainants. * * * *This court even under the uniform Declaratory Judgment Act, should not undertake to decide or declare rights or status of parties upon a state of facts which is future, contingent and uncertain.*"

Such has long been the rule in England, where it is held that jurisdiction to render declaratory judgments is discretionary and should be exercised with great care and with due regard to all the circumstances of the case.

Burghes v. *Attorney General* (1911) 2 Ch. 139 80 L. J. Ch. N. S. 506, 105 L. T. N. S. 193.

Furthermore, the English courts have consistently refused to assume jurisdiction unless the judgment which may be rendered will be *res judicata* upon the parties and the issues.

Hammerton v. *Dysart* (1916) 1 A. C. 57.

Stephenson v. *Grant L. & Co.* (1917) W. N. 47 86 L. J. Ch. N. S. 439, 116 L. T. N. S. 268.

Hampton v. *Holman* (1877) L. R. 5 Ch. Div. 183, 46 L. J. Ch. N. S. 248, 36 L. T. M. S. 287.

12 *Am. Law Reports annotated*, pp. 66, 67, 69, and 71.

For these reasons, we submit that even if the District Court had been entitled to proceed under the Kentucky Act, its refusal to proceed and its judgment of dismissal were correct.

The Authorities Cited by the Plaintiffs in Error Do Not Support Their Position.

The Plaintiffs in error are unable to refer to any authorities which directly support their position. The cases cited by them relate to entirely dissimilar situations and call for only brief comment.

Several of the cases relate to questions which have arisen concerning the so-called "original package" doctrine. There is no question of original packages involved in the present action. The Kentucky Warehouse Act of 1924 regulates the auctioning of leaf tobacco within the State of Kentucky, after the goods have come to rest in the state and may have become mingled with other property and are then offered to bidders within the state from the floor of the looseleaf warehouse.

In this class of cases is *Austin* v. *Tennessee* (1900) 179 U. S. 343, 45 L. ed. 224. That case was brought to the Supreme Court to review the conviction of the Defendant for selling cigarettes under a Tennessee law which made it a misdemeanor to sell, bring into the state or give away cigarettes, cigarette papers or a substitute. The court held that this statute was within the police power of the state and that a package of ten cigarettes was not an original package so as to make the law a regulation of interstate commerce, contrary to the Constitution of the United States.

Cook v. *County of Marshall* (1905) 196 U. S. 261, 49 L. ed. 471.

There is another case holding that a tax imposed on cigarette selling by an Iowa statute is not an invalid regulation of commerce as applying to sales at retail of

packages of ten cigarettes in small boxes shipped to the retailer from another state.

Leisy v. *Hardin* (1890) 135 U. S. 100, 34 L. ed. 128.

There is another case discussing the "original package" doctrine and holding that a state can not prohibit the importation of beer in original barrels. Obviously none of the above cases have anything to do with the present action.

In *Crutcher* v. *Kentucky* (1891) 141 U. S. 47, 35 L. ed. 649, a Kentucky statute requiring express companies to take out licenses as a condition to doing an interstate business in Kentucky was properly held unconstitutional.

Shafer v. *Farmers Grain Co.* (1925) 268 U. S. 189, 69 L. ed. 909 involved an attempt by the state of North Dakota to regulate and control the marketing of grain in interstate commerce. Following a long line of well-known cases, the attempt of the state to regulate *interstate* marketing was declared unconstitutional. But the court points out the distinction between cases of that character and cases like *Merchants Exchange* v. *Mo.* (1919) 248 U. S. 365, 63 L. ed. 300 which involved a regulation of the business of conducting an elevator for hire and was held proper even though grain was shipped into the elevator from out of the state and shipped from the elevator to points without the state.

South Covington & Cincinnati St. Ry. Co. v. *Newport* (1922) 259 U. S. 97, 66 L. ed. 842 is apparently cited to support a jurisdictional claim. An examination of that case shows that a municipal resolution directed the removal of a high tension wire belonging to the plaintiff and that the city intended to forcibly remove the wire and thereby destroy plaintiff's property without any process of law. The court held that the bill of the plain-

tiff showed Federal jurisdiction and distinguished the case from *Des Moines* v. *Des Moines City R. Co.* (1909) 214 U. S. 179, 53 L. ed. 958 on the ground that in the latter case the city did not intend to proceed otherwise than according to law and in court and that hence no Federal questions were involved.

In *Collins* v. *New Hampshire* (1898) 171 U. S. 30, 43 L. ed. 60, a state statute requiring persons importing oleomargarin from without the state to color the same pink was held an unlawful regulation of interstate commerce.

The above cases are the only decisions of this court cited by the Plaintiffs in error. Their inapplicability to the jurisdictional questions before the Court is so plain that further comment by us is unnecessary.

The only statutes referred to by the Plaintiffs in error in support of their right to maintain the present action are (1) The Kentucky Declaratory Judgment Act; (2) Section 24, subsection 14 of the Judicial Code; and (3) the Practice Conformity Act, Sec. 914, U. S. Revised Statutes.

Each of these statutes has been discussed under previous headings of this brief. The only Supreme Court case referred to by Plaintiffs in error in connection with their citation of the Practice Conformity Act is *Amy* v. *Watertown* (1889) 130 U. S. 301, 32 L. ed. 946. That case related purely to a question of state practice with respect to the service of summons on the mayor of a city. All that the court held was that, since Congress had not laid down any rule with respect to the service of mesne process upon corporations and other persons, the state law and practice should be followed.

Ellis v. *Davis* (1883) 109 U. S. 485, 27 L. ed. 1006 is referred to by Plaintiffs in error. This case holds that

although no jurisdiction belongs to the Circuit Courts of the United States, as courts of equity, to try the invalidity of a will or the probate thereof, the courts of the United States are entitled to administer the law of the jurisdiction in which they sit where there is diversity of citizenship.

Fourth Nat'l Bank of N. Y. v. *Francklyn* (1887) 120 U. S. 747, 30 L. ed. 285, also referred to by Plaintiffs in error, is a decision to the effect that in determining the individual liability of stockholders for the debts of a corporation, the United States courts follow the statutes and decisions relating thereto of the state which creates the corporation.

None of these cases involve any attempt to extend or enlarge the jurisdiction of the United States courts by virtue of a state statute. No authority is cited, and none can be found to support the far-reaching proposition for which the Plaintiffs in error contend; that, under the Practice Conformity Act, the United States courts have, by virtue of state laws, the special and enlarged jurisdiction expressly conferred upon the courts of the state in which they sit by virtue of state laws.

Conclusion.

We respectfully submit that the order of the learned district judge dismissing the Plaintiffs' Petition was correct and that the judgment of the court below should be affirmed.

Respectfully submitted,

AARON SAPIRO,
ROBERT S. MARX,
Attorneys for Defendant in Error.

CHICAGO, ILLINOIS, April 21, 1926.

APPENDIX A.

ACT OF KENTUCKY, 1922, CHAPTER 83, PAGE 235.

"AN ACT TO AUTHORIZE COURTS OF RECORD TO MAKE BINDING DECLARATION OF RIGHTS, AND PROVIDING THE PROCEDURE BY WHICH ACTIONS TO SECURE SUCH DECLARATION OF RIGHTS ARE TO BE PROSECUTED AND DETERMINED.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

2. Any person interested under a deed, will or other instrument of writing, or in a contract, written or parol, or whose rights are affected by statute, municipal ordinance, or other government regulation, or who is concerned with any title to property, office, statute or relation; or who as fiduciary, or beneficiary is interested in any estate; provided always that an actual controversy exists with respect thereto; may apply for and secure a declaration of his rights or duties, even though no consequential or other relief be asked. The enumeration herein contained does not exclude other instances wherein a declaratory judgment may be prayed and granted under Section 1 of this act, whether such other instance be of a similar or different character to those so enumerated.

3. Declaration of rights and determination of questions of construction, as herein provided for, may be obtained by means of proceedings at law or in equity, or by means of a petition on either the law or equity side of the court, as the nature of the case may require; and in so far as a declara-

tion of rights is the relief asked, the case may be docketed for early hearing as in the case of a motion.

4. Further relief, based on a declaratory judgment, order or decree, may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief, either in the same proceeding wherein the declaratory judgment, order or decree, was entered, or, in an independent action. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment, order or decree, to show cause why further relief should not be granted forthwith.

5. Any party aggrieved by a declaratory judgment, order or decree, rendered in the Circuit Court, may within sixty days after such judgment, order or decree has become final, unless the time be extended by the court, but in no event in courts of continuous session beyond 120 days from the time that such judgment, order or decree became final, and in other courts beyond a day in the succeeding term to that in which the judgment, order or decree became final; take and perfect an appeal to the Court of Appeals in the manner now provided by law for appeals. Such appeal shall be at once docketed in the Court of Appeals, and may be advanced for immediate hearing and submission. The Court of Appeals shall prepare proper rules as to arguments and briefs applicable to cases brought before it under this act, and advanced as above prescribed.

Should the party aggrieved not take and perfect an appeal to the Court of Appeals, within the time above provided, the declaratory judgment, order or decree, shall become final, and no appeal or proceeding to modify or reverse shall thereafter be allowed.

6. The court may refuse to exercise the power to declare rights, duties, or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at

the time under all the circumstances. The appellate court in its consideration of the case, shall not be confined to errors alleged or apparent in the record. When, in its opinion, further pleadings or proof is necessary to a final and correct decision of the matters involved, or that should be involved, it shall remand the case for that purpose; or if in its opinion the action is prematurely brought, or where a ruling in the appellate court is not considered necessary or proper at the time under all the circumstances, it may direct a dismissal without prejudice in the lower court.

7. When an action or proceeding under this act shall involve the determination of an issue of fact triable by a jury, such issue may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be rendered or required or not.

8. The parties to a proceeding to obtain a declaratory judgment, order or decree, may stipulate with reference to the allowance of costs and in the absence of such stipulation the court may make such award of costs as may seem equitable and just.

9. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the petition and be entitled to be heard.

10. This act is declared to be remedial; its purpose is to make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty and insecurity with respect to rights, duties and relations, and is to be liberally interpreted and administered.

11. The word 'person' wherever used in this act, shall be construed to mean any person, partnership,

joint stock company, incorporated association, or society, or municipal or other corporation of any character whatsoever.

12. All statutes or laws in conflict or inconsistent with the provisions of this act, are hereby repealed. It is intended that this act shall be valid to the fullest extent possible; and that the invalidity, if any, of any part or feature thereof, shall not affect or render the remainder of the act invalid or inoperative.

13. This act shall take effect from and after its passage.

Approved March 23, 1922."

APPENDIX B.

ACT OF KENTUCKY, 1924, CHAPTER 10, PAGE 15.
"AN ACT REGULATING THE SALES OF LEAF TOBACCO AT PUBLIC AUCTION IN THIS COMMONWEALTH."

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

That Section 4814b-1 to 4, inclusive, Kentucky Statutes, Carroll's Edition, 1915, be and the same is hereby repealed and the following enacted in lieu thereof:

1. That it shall be the duty of any tobacco warehouseman, corporation, firm or individual, who shall receive, or who shall undertake to receive or take care of leaf tobacco, for sale at public auction, whether with or without compensation or reward, to post or cause to be posted, a notice, in a conspicuous place upon the premises of said warehouseman, corporation, firm or individual, stating the number of pounds in the aggregate, actually sold, and the average price per pound received on account of each day's sale. It shall further be the duty of said warehouseman, prior to any such sale, to post at a point in the office of said warehouse, convenient and accessible for public inspection a typewritten or printed list showing the true name and post office address of the owner and producer and the number of pounds of tobacco of each person, firm or corporation, whose tobacco will that day be offered for sale in said warehouse. No tobacco shall be delivered to or received by any warehouseman for sale at public auction, unless the true names and post office addresses of the producer and owner of such tobacco are furnished said warehouseman by the person delivering same.

2. It shall be the duty of said warehouseman to post said notice of sale not later than nine o'clock a. m. on the day following such sale or sales; to post said list of tobacco to be that day sold, not less than thirty minutes prior to sale of tobacco of any owner or producer.

3. Any warehouseman, corporation, firm or individual who shall fail or refuse to post the said notices in accordance with the provisions of this act shall be subject to a fine in a sum not less than $50.00 nor more than $100.00 for each day for so failing or refusing.

4. Any warehouseman, corporation, firm or individual who shall in said notice falsify the actual number of pounds sold or the average price thereof, or shall falsely list the name, post office address or number of pounds of tobacco of any producer or owner whose tobacco will that day be offered for sale, or shall furnish a false name or address of the owner or producer to any warehouseman, shall be subject to indictment and upon conviction shall be fined $500.00 for each offense.

5. Owing to the existence of unnecessary litigation and confusion growing out of the delivery and sale of tobacco in Kentucky, an emergency is hereby declared to exist and this act shall take effect from and after its passage and approval by the Governor.

Approved February 27, 1924."

APPENDIX C.

Jewell Tobacco Warehouse Co. et al. v. *Kemper, Commonwealth's Attorney et al.*

(Court of Appeals of Kentucky. Jan. 20, 1925.)
(Headnotes from 268 S. W. 324.)

1. Constitutional law Key 208(6)—Act regulating sale of leaf tobacco at auction not invalid as arbitrary classification.

Acts 1924, c. 10, regulating sale of leaf tobacco at public auction, placing all tobacco warehouses in same classification, and subject to same rules and requirements, is not invalid as employing arbitrary classification.

2. Constitutional law Key 208(6)—Classification of business may be made according to natural and recognized lines of distinction.

Classification or division of businesses, occupations, and callings into particular classes may be made according to natural, reasonable, and well-recognized lines of distinction.

3. Constitutional law Key 296(1)—Act regulating sale of leaf tobacco at auction held not violative of due process.

Acts 1924, c. 10, regulating sale of leaf tobacco at public auction, not depriving warehousemen of property without due process of law, is not violative of Const. U. S. Amend. 14.

4. Commerce Key 60(1)—Act regulating sale of leaf tobacco at auction held not to interfere with interstate commerce.

Acts 1924, c. 10, regulating sale of leaf tobacco at public auction, held not invalid as interfering with interstate commerce.

5. Statutes Key 82—Act regulating sale of leaf tobacco at auction held not to be special legislation.

Acts 1924, c. 10, regulating sale of leaf tobacco at public auction, held not to be special legislation within Const. Sec. 59, subsecs. 4, 24, 29.

6. Statutes Key 115(1)—Act regulating sale of leaf tobacco at auction held not invalid as to title.

Acts 1924, c. 10, entitled: "An act regulating the sale of leaf tobacco at public auction in this Commonwealth," held not violative of Const. Sec. 51; title being concise, yet comprehensive of whole subject treated therein.

7. Warehousemen Key 2—Act regulating sale of leaf tobacco at auction held within police power of state.

Duties under Acts 1924, c. 10, regulating sale of leaf tobacco at public auction, held to be regulatory and within police power of state.

Appeal from Circuit Court, Fayette County.

Suit by the Jewell Tobacco Warehouse Company and others against Maurey Kemper, Commonwealth's Attorney, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hunt, Northcutt & Bush, of Lexington, for appellants.

Allen, Botts & Duncan, of Lexington, Robert H. Hayes, of Lancaster, Stanley Reed, of Ashland, and Aaron Sapiro, of Chicago, Ill., for appellees.

SAMPSON, *J.* The constitutionality of an act of the General Assembly, entitled "An act regulating the sales of leaf tobacco at public auction in this commonwealth," passed in 1924, being chapter 10 of the Acts of that session, is called in question by this litigation. The parties plaintiff are Jewell Tobacco Warehouse Company, New Independent Warehouse Co., Virginia Avenue Tobacco Warehouse Company, and T. C. Geary, trading and doing business as the Geary Tobacco Company; all corporations except the Geary Tobacco Company.

Among other things, it is alleged in the petition that the plaintiffs are each now and have been for many years past engaged in the business of operating and conducting a loose leaf tobacco warehouse, in the city of Lexington, Ky., and that in the conduct of warehouse the plaintiff sold tobacco at public auction over their floors; that the large part of tobacco grown in Kentucky is so sold; and that a large amount of tobacco from other states was shipped into Kentucky and handled in the same manner. It is then alleged:

> "That each of them has a large investment in the warehouses operated by them respectively, and each

of them employs a large number of men each year in the conduct of their respective places of business, and in the conduct of their business. Said plaintiffs state that a large part of the value of their business consists of a list of satisfied customers and patrons, and that the business conducted by each of them has a good will value, in that their customers and patrons have been selling tobacco with them respectively for a number of years, and that the disclosures of the names of their customers and patrons, who produce and own tobacco, and who sell same at said warehouses, and the disclosure of the post office addresses of such customers and patrons, would cause to them and each of them a serious loss, in that their said customers and patrons do not desire to disclose to the public generally or to competitors in business, the amount of tobacco marketed by them respectively, or the price received by them respectively, for the crops so grown and sold."

After charging that the act of 1924 materially and seriously affects their rights, it is further alleged "that, in the conduct of their respective warehouses, and in conducting sales of leaf tobacco at public auction, it is necessary for them to know whether said act of 1924 is valid or invalid, and whether these plaintiffs are liable for the crimes therein denounced, and subject to the penalties described in said act of 1924, and whether under said act crimes can be innocently committed by them, and the penalties therein prescribed imposed upon them, even though diligent efforts are made on their part to comply with said law.

A copy of the contract between the Burley Tobacco Co-operative Marketing Association and its members is set out in full, and made a part of the petition. It is then averred:

"They are advised, believe, and charge that the Burley Tobacco Co-operative Marketing Association caused to be prepared and to be introduced in the General Assembly of Kentucky what is known as chapter 10 of the Acts of 1924, and that said association was largely instrumental in securing the passage of said act. Said plaintiffs state that said act of 1924 was intended for the sole use of the Burley Tobacco Co-operative Marketing Association,

and was passed for the sole purpose of enabling said Burley Tobacco Co-operative Marketing Association to control more effectively its member, and to secure a performance on the part of its members of contracts made with it."

Following this is the allegation that:

"Under the Bill of Rights they have the right of seeking and pursuing their safety and happiness, and of acquiring and protecting property that it is further provided in the Constitution that absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority, and that private property cannot be taken and applied to public use without just compensation being previously made. Said plaintiffs state that said act of 1924 is invalid, and in violation of the Bill of Rights, and sections 2 and 13 of the Constitution; that said act is invalid, because it violates section 59, subsection 4, and section 59, subsection 29, of the Constitution."

Plaintiff also charged that:

"Said act of 1924 is a special or local act, passed for the sole benefit of said Marketing Association, that it involves an invasion of the rights of property of these plaintiffs, and was intended to be and is a practical inhibition of the business of selling leaf tobacco at public auction in Kentucky so long as the said Marketing Association continues to operate under the Bingham Co-operative Act."

It is further averred in the petition that:

"The Legislature of Kentucky, under the guise of protecting the interests of the public, has arbitrarily attempted to interfere with private business, and to impose unusual and unnecessary restrictions upon the business conducted by these plaintiffs, and that the provisions of the act of 1924 are arbitrary and oppressive."

And further that:

"Said act of 1924 is invalid, because it violates the provisions of the Fourteenth Amendment to the Constitution of the United States, and that under

said law the state of Kentucky has denied to these plaintiffs, within its jurisdiction, the equal protection of the laws, and has attempted to abridge their privileges and immunities as citizens of the United States, and has deprived these plaintiffs of property without due process of law; * * * that said act of 1924 is an unreasonable restriction upon their right to acquire and dispose of property; that it is an unreasonable restriction to prohibit them from conducting a business which is not detrimental to the public; * * * that the attempt on the part of the General Assembly of Kentucky to prohibit these plaintiffs from conducting a business is a taking of their property without due process of law; that a requirement that the names of all of their customers and patrons shall be disclosed as a taking of their property without due process of law and an arbitrary and oppressive restriction upon their right to do business."

To the petition is attached a prayer that the court declare the rights and duties of the plaintiffs under said act of 1924, and that the representatives of the commonwealth be enjoined from the enforcement of said act of 1924.

An amended petition was filed in which it was alleged:

"That more tobacco is grown in Kentucky than in any other state in the Union; that between 75 and 80 per cent of the growers of tobacco in Kentucky belong to the two co-operative associations in Kentucky; that one of said associations operates in the Burley belt, which includes Fayette county, Ky., and the other association operates in Western Kentucky, in what is known as the dark belt; that the growers of tobacco, who are members of the two associations referred to raise between 75 and 80 per cent of the tobacco grown in Kentucky each year. * * * Said plaintiffs state that said associations operate warehouses in Kentucky, at which tobacco produced by certain growers is delivered to them respectively, and, after the same is delivered, said tobacco is commingled with the tobacco grown by other persons, and is graded according to the demands of the market, and each grade is kept separate, but that no attempt is made to keep the tobacco grown by each

producer separate and distinct from that grown by other producers, but the same, when commingled with the tobacco of others, loses its identity, and each producer who delivers tobacco to either one of said associations receives a certificate to the effect that he has delivered a certain number of pounds of a certain grade."

A general demurrer was filed to the petition as amended and sustained by the trial court; judgment being entered holding the act of 1924 constitutional, and dismissing the plaintiff's petition.

For half a century Kentucky has by statutes regulated the business of warehousemen. In 1914, c. 48, an act entitled: "An Act requiring tobacco warehousemen handling loose leaf tobacco to post on their premises the number of pounds and the average price thereof of each day's sales and prescribing penalties," became a law. The first section of the present act repealed the act of 1914, and re-enacted it in the following words:

"That it shall be the duty of any tobacco warehouseman, corporation, firm or individual who shall receive, or who shall undertake to receive or take care of leaf tobacco, for sale at public auction, whether with or without compensation or reward, to post or cause to be posted, a notice, in a conspicuous place upon the premises of said warehouseman, corporation, firm or individual, stating the number of pounds in the aggregate, actually sold, and the average price per pound received on account of each day's sale. It shall further be the duty of said warehousemen, prior to any such sale, to post at a point in the office of said warehouse, convenient and accessible for public inspection, a typewritten or printed list showing the true name and post office address of the owner and producer and the number of pounds of tobacco of each person, firm or corporation, whose tobacco will that day be offered for sale in said warehouse. No tobacco shall be delivered to or received by any warehousemen for sale at public auction, unless the true names and post office addresses of the producer and owner of such tobacco are furnished said warehousemen by the person delivering same.

"SEC. 2. It shall be the duty of said warehousemen to post said notice of sale not later than nine o'clock a. m. on the day following such sale or sales; to post said list of tobacco to be that day sold, not less than thirty minutes prior to sale of tobacco of any owner or producer.

"SEC. 3. Any warehousemen, corporation, firm or individual who shall fail or refuse to post the said notices in accordance with the provisions of this act shall be subject to a fine in a sum not less than $50.00, nor more than $100.00, for each day for so failing or refusing.

"SEC. 4. Any warehousemen, corporation, firm or individual who shall in said notice falsify the actual number of pounds sold or the average price thereof, or shall falsely list the name, post office address or number of pounds of tobacco of any producer or owner whose tobacco will that day be offered for sale, or shall furnish a false name or address of the owner or producer to any warehousemen, shall be subject to indictment and upon conviction shall be fined $500.00 for each offense."

Appellants insist that the act of 1924 is repugnant to our state Constitution (1) in that it does not come within the provisions of section 206 thereof; (2) it is special legislation within the meaning of subsections 4, 24, and 29 of section 59 of the Constitution, regulating the punishment of crimes and misdemeanors and regulating trade; (3) that it employs arbitrary classification; (4) that the attempted classification is unreasonable and unnatural, capricious, and oppressive; (5) that the classification is partial, discriminatory, arbitrary, and without reason; (6) it violates the Fourteenth Amendment to the Constitution of the United States; (7) it is invalid because it attempts to regulate commerce; (8) the act is special legislation passed for the benefit of the tobacco pool." All these contentions are denied by the appellees, Kemper, etc.

[1, 2] The act does not appear to be subject to the criticisms made of it by appellants. It places all tobacco warehouses, whether owned and operated by a corporation, firm, or individual, "who shall receive or who shall undertake to receive or take care of loose leaf tobacco,

for sale at public auction, whether with or without compensation or reward," in the same classification, and subject to the same rules and requirements. It therefore covers all tobacco warehousemen who receive leaf tobacco for sale at public auction. It is equal and uniform, embracing all persons, corporations, and firms engaged in that particular business—that of receiving tobacco at a warehouse to be sold at public auction. Classification or division of businesses, occupations, and callings into particular classes may be made according to natural, reasonable, and well-recognized lines of distinction. This rule is well established in this jurisdiction. *Metropolitan Life Insurance Co.* v. *City of Paris*, 139 Ky. 801, 129 S. W. 112; *Hager* v. *Walker*, 128 Ky. 1, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A. (N. S.) 195, 129 Am. St. Rep. 238; *Brown-Foreman Co.* v. *Commonwealth*, 125 Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793; *Louisville* v. *Schnell*, 131 Ky. 104, 114 S. W. 742, 40 L. R. A. (N. S.) 637; *Carlisle* v. *Heckinger*, 103 Ky. 381, 45 S. W. 358, 20 Ky. Law Rep. 74; *City of Louisville* v. *Sagalowski & Son*, 136 Ky. 324, 124 S. W. 339, 136 Am. St. Rep. 258; *Potter* v. *Dark Tobacco Growers' Co-operative Ass'n*, 201 Ky. 447, 257 S. W. 336; *Owen County Burley Society* v. *Brumback*, 128 Ky. 137, 107 S. W. 710, 32 Ky. Law Rep. 916; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 34 S. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525.

> "There is nothing unequal in classifying differently merchants who pay an annual tax on their stocks of goods under the revenue laws of the city, and those who pay no such tax. Likewise there is no unconstitutional discrimination in distinguishing between private bankers on a basis as to whether their business is or is not such as to require the giving of a statutory bond; or between those who sell merchandise at auction and those who sell household furniture at the house where it has been in use; or between persons who go from house to house, and place to place, selling their own products, and those who sell in the same way the productions of others." 17 R .C. L. pp. 512 and 513.
>
> "Under the rule that classification of occupations or forms of business may be made wherever the difference or distinction on which it is founded is not wholly without reason, it is an established rule that

those who follow a commonly designated business or vocation may, where a basis for reasonable distinction exists, be reclassified or subdivided into new and separate classes. In this connection it has been declared that the legislative classification may be founded on the nature of the articles sold, as well as on the manner of conducting the business. Accordingly, it has been held that discrimination between merchants having fixed places of business in the municipality and also persons 'selling to the trade' on the one hand, and retail dealers who have no regular place of business on the other hand, is not unlawful for the purpose of license taxes." 17 R. C. L. p. 518. *Commonwealth et al.* v. *Hazel*, 155 Ky. 30, 159 S. W. 673, 47 L. R. A. (N. S.) 1078; *City of Louisville* v. *Sagalowski & Son, supra.*

In the case of *Owen County Burley Tobacco Society* v. *Brumback*, 128 Ky. 137, 107 S. W. 710, 32 Ky. Law Rep. 916, in construing the act of 1906 regulating the pooling of tobacco and other farm products for the purpose of classifying, grading, and selling same, we held it was competent for the General Assembly to classify persons and occupations, and to pass legislation for the government of each class as fixed, and that such a law does not grant any exclusive separate public emoluments or privileges within the meaning of the Bill of Rights, but simply selects and classifies and specifically provides what it may do without withholding the privilege from others, and so far as it effects members of a class selected, it does not violate the Bill of Rights.

In the case of *State* v. *Walter Bowen & Co.*, 86 Wash. 23, 149 P. 330, Ann. Cas. 1912B, 625, quoting from *Lasher* v. *People*, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. Rep. 103, it is said:

"Bringing to aid the presumptions in favor of the legislative power and also the presumption that a state of facts exists which would warrant the selection of the persons or classes which this law hits, we believe that the reasoning in the Minnesota and Illinois cases is convincing. 'This objection to the law is not valid. The Legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in

substantially the same situation. A discrimination must rest upon some reasonable ground of difference, but the classification in this case is a reasonable one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock, and dressed meats.' "

There is a clear distinction between the warehousemen who sell tobacco at public auction and those who negotiate private sales. That distinction has often been recognized.

Our General Assembly has enacted and this court has sanctioned a license tax or occupational tax on auctioneers which necessarily means that those who sell at public auction have been separated into a class and constituted such in contradistinction to those who sell in private. Section 4224, Kentucky Statutes.

[3, 6] Neither do we agree with appellee that the act of 1924 deprives them of property without due process of law, for it takes nothing from them, but merely regulates the conduct of their business, nor does it interfere with interstate commerce, or is it special legislation within the meaning of subsections 4, 24, and 29 of section 59 of our Constitution, or violative of section 51 of that instrument; the title being concise, yet comprehensive of the whole subject treated in the act.

[7] The able and learned trial judge, who so satisfactorily presides over the Fayette circuit court, delivered an opinion at the time of the rendition of the judgment appealed from in which he, in our judgment, correctly construed and interpreted the act of 1924. We can think of no reason why a warehouseman conducting auction sales of loose leaf tobacco may not easily comply with the provisions of the act when properly interpreted. The duties are simple and easily performed. They are but regulatory, and such as come clearly within the police power of the state. The act, when simplified, means that the warehouseman must post not less than 30 minutes prior to the sale of tobacco of any owner or producer, at a point in the office of said warehouse convenient and accessible for public inspection, a typewritten or printed

list showing the true name and post office address of the owner and producer, and the number of pounds of tobacco of each person, firm, or corporation whose tobacco will that day be offered for sale in said warehouse.

He must post, not later than 9 a. m., on the day following the sale, a notice in a conspicuous place upon his premises, stating the number of pounds of tobacco in the aggregate actually sold, and the average price per pound received on account of each day's sale.

Every person delivering tobacco to a warehouse for sale at public auction must give to the warehouseman the true name and post office address of the producer and owner of the tobacco, and, unless such names and post office addresses are given, the warehouseman shall not receive the tobacco. If the warehouseman fails to post the notices which are required to be posted at 9 in the morning after the day of sale, then he is subject to a fine. If the warehouseman or person selling the tobacco falsifies the actual number of pounds sold, or the average price thereof, or who shall falsely list a name, post office address, or number of pounds of tobacco of the producer or owner whose tobacco that day shall be offered for sale, he is liable to a fine.

If any person shall furnish a false name or address of the owner or producer of the tobacco to the warehouseman, he shall be subject to a fine.

A warehouseman who posts the name and address of the producer and owner of the tobacco, which name and address is furnished by the person delivering the tobacco, complies with the act, and he is not subject to punishment in accordance with the provisions thereof, even though the information given be false, unless the warehouseman actually knows that the name and address so furnished are false and untrue. He has a right to rely upon the truth of the representations made by the person delivering the tobacco to the warehouse. If the deliverer of the tobacco gives a fictitious or false name of the owner or producer, he calls down upon his head the penalties prescribed by the act.

So construed, the act is not subject to any of the objections urged by appellants.

Finding no error to the prejudice of the substantial

rights of appellant, the judgment declaring the act constitutional is affirmed.

Judgment affirmed.

Whole court sitting and concurring.